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Betsy Rosenblatt

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# Belonging as Intellectual Creation

Betsy Rosenblatt\*

## ABSTRACT

*This Article considers the question of “what we create when we create.” Certainly, one product of creation is “stuff” – inventions, trademarks, and works of authorship. But the same creative process also generates other public, personal, or social goods, such as skills, self-actualization, and community. This project postulates that for some creators, a sense of belonging is a product of intellectual creation that has social value independent of the “stuff” associated with its creation. The project considers social science research establishing a sense of belonging as a fundamental human need and driver of behavior and considers how in creative communities a desire for a sense of belonging encourages both creation and adherence to copying and attribution norms that may differ from formal law. This refines the common narrative “stuff” as the only product of intellectual creation and calls for change in how we think about intellectual property law’s exclusivity-based incentive structure.*

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## I. INTRODUCTION

What is a “creation”? The standard narrative of intellectual property law presumes that a “creation” is a discrete, generally physical, thing: an invention. A trademark. A work of authorship.<sup>1</sup> The law presumes that these tangible creations promote progress and facilitate commerce and that giving creators exclusive rights over the copying and use of these tangible creations makes the act of creating them appealing and financially viable.<sup>2</sup>

But what if our definition of “creation” were not so limited? Of course, creators make “stuff”<sup>3</sup> – inventions, marks, works of authorship – but they may also create any number of other things that intellectual property law does not recognize as “creations.” Creators may “create” their own skills.<sup>4</sup> They may “create” their own personalities and identities.<sup>5</sup> They may “create” communities.<sup>6</sup> These creations may be at least as valuable as money to the creators or to society at large, but they are not the sorts of things that intellectual property law strives to promote. Intellectual property law pays little attention to whether a musician feels like a valued member of an artistic com-

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1. See *Intellectual Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 304 (1988) (“In almost all of its decisions on patents, the Supreme Court has opined that property rights are needed to motivate idea-makers.”); *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 241–42 (1832) (the goal of the copyright and patent clause is to incentivize creators).

3. Cf. GEORGE CARLIN, *BRAIN DROPPINGS* 37 (1998) (“So stuff is important. You gotta take care of your stuff. You gotta have a *place* for your stuff. Everybody’s gotta have a place for their stuff. That’s what life is all about, tryin’ to find a place for your stuff!”).

4. See Org. for Transformative Works, *Comments of the Organization for Transformative Works*, NAT’L TELECOMMS. & INFO. ADMIN. 38–56 (Nov. 13, 2013), [https://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf); Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women’s Voices on Fandom and Fair Use*, in *eGIRLS, eCITIZENS: PUTTING TECHNOLOGY, THEORY AND POLICY INTO DIALOGUE WITH GIRLS’ AND YOUNG WOMEN’S VOICES* 385, 393–96 (2015).

5. See Org. for Transformative Works, *supra* note 4, at 20–38; Rosenblatt & Tushnet, *supra* note 4, at 388–93.

6. See Org. for Transformative Works, *supra* note 4, at 22–23.

munity, whether an engineer feels respected and appreciated, or whether a media fan finds a sense of self by creating derivative works.

But why not? The idea of progress could easily embrace ideas of human flourishing that may be harder to measure than the quantity (or even the quality) of inventions, marks, and works of authorship. Just because these notions are less countable does not make them less important.<sup>7</sup> This Article suggests that one possible creation of intellectual endeavor is a sense of belonging, and that belonging is worth considering in the context of intellectual property law and policy.

Most accounts of intellectual property law start from the premise of justifying and optimizing exclusivity.<sup>8</sup> Only a few qualitative studies and explorations of intellectual property theory consider non-exclusivity benefits of creating, such as developing skills, self-determination, or self-actualization.<sup>9</sup> Even recent studies on the value of the public domain considered only the public domain's economic value, not its value to public discourse or to crea-

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7. There is considerable debate among intellectual property scholars concerning the definition of "progress." See, e.g., Dan L. Burk, *Diversity Levers*, 23 DUKE J. GENDER L. & POL'Y 25, 28–29 (2015) (discussing the debate and possible definitions of "progress," including wider dissemination of knowledge, generation of aesthetically pleasing works, generation of works that are less environmentally burdensome or more socially just, or other benefits to happiness or dignity). A recent empirical study indicates that "progress" for many creators and innovators "appears to resonate less with quantity and quality of work and more with equality and distributive justice regarding their practices and experiences of working." Jessica Silbey, *IP and Constitutional Equality*, BALKINIZATION (Mar. 17, 2015), <http://balkin.blogspot.com/2015/03/ip-and-constitutional-equality.html>. Many artists from a variety of disciplines describe their interests in making art as focusing on, in significant part, the accomplishment of social or public benefits such as community-building. See Jessica Silbey, *Promoting Progress: A Qualitative Analysis of Creative and Innovative Production*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 515, 522, 525 (2014) [hereinafter Silbey, *Promoting Progress*].

8. See generally ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (identifying theoretical bases for intellectual property exclusivity); William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (2001) (same); Hughes, *supra* note 2 (same); David W. Opperbeck, *Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations*, 10 U. ST. THOMAS L.J. 738, 740–41 (2013) (identifying justification for intellectual property exclusivity in Christian theology); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (justifying property ownership from a personhood perspective and "exploring how the personhood perspective can help decide specific disputes between rival claimants").

9. See generally JESSICA SILBEY, THE EUREKA MYTH: EVERYDAY INTELLECTUAL PROPERTY (2015) [hereinafter SILBEY, EUREKA MYTH]; Rosenblatt & Tushnet, *supra* note 4; LAURA J. MURRAY, S. TINA PIPER & KIRSTY ROBERTSON, PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR AND THE EVERYDAY 7 (2014) ("We wish also to recognize outcomes or products beyond cultural or intellectual property, such as community relationships, consolidation of professions, quality of life, and the education of [the] next generation[s].").

tors' well-being.<sup>10</sup> Although many scholars have observed that exclusivity and creative incentives are not inextricably linked, those scholars have still tended to approach questions of creation and innovation from a stuff-based standpoint.<sup>11</sup> Perhaps this is because, as Professor William W. Fisher has noted, analyses of human flourishing in relation to intellectual property tend to “repudiate the principle central to both the dominant form of economic analysis and to the dominant form of contemporary liberalism: that the state ought to remain neutral concerning alternative conceptions of the good.”<sup>12</sup> It may be difficult to incorporate considerations of human flourishing into typical intellectual property analyses, but I contend that difficulty makes the endeavor all the more important.

The animating principle behind copyright and patent law is the promotion of “progress.”<sup>13</sup> While the prevailing constitutional interpretation of “progress” focuses exclusively on the production and advancement of material goods, many authors and inventors view “progress” as having as much to do with community as with stuff. For example, in an empirical study by intellectual property law scholar Jessica Silbey, many artists saw their mission as contributing to their communities in ways that “helped, that brought pleasure, [and] that connected people.”<sup>14</sup> This connection between people – sepa-

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10. See generally KRIS ERICKSON ET AL., UK INTELLECTUAL PROP. OFFICE, COPYRIGHT AND THE VALUE OF THE PUBLIC DOMAIN: AN EMPIRICAL ASSESSMENT (2015),

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/561543/Copyright-and-the-public-domain.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561543/Copyright-and-the-public-domain.pdf); KRIS ERICKSON ET AL., UK INTELLECTUAL PROP. OFFICE, COPYRIGHT AND THE ECONOMIC EFFECTS OF PARODY: AN EMPIRICAL STUDY OF MUSIC VIDEOS ON THE YOUTUBE PLATFORM AND AN ASSESSMENT OF THE REGULATORY OPTIONS (2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/309903/ipresearch-parody-report3-150313.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf). But see Rosenblatt & Tushnet, *supra* note 4.

11. This is true even of recent efforts, including those that recognize the inadequacy of theories that “reduce[] human persons, human ideas, and human cultures to bits, memes, and utility machines.” Opderbeck, *supra* note 8, at 738 (summarizing social relations and virtue ethics theories of intellectual property and proposing a theory based on Christian theology). Several scholars have proposed relational or communicative theories of intellectual property, but even those tend to focus on the relationship between creator and audience/user, rather than relationships among creators. See generally CARYS J. CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW (2011); ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? (2015); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012). But see MURRAY, PIPER & ROBERTSON, *supra* note 9, at 7 (framing intellectual property practices as contextual and dependent upon community).

12. William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1463 (2010) (discussing scholarship on intellectual property and human flourishing).

13. U.S. CONST. art. I, § 8, cl. 8.

14. Silbey, *Promoting Progress*, *supra* note 7, at 525.

rate from the objects created – was part of the artists’ vision of “progress.”<sup>15</sup> Silbey’s study also revealed that for many creators and innovators, progress requires not only that they are able to produce goods, but also that those goods are available to the community that can benefit from them.<sup>16</sup> For these individuals, formal intellectual property law can be both over- and under-inclusive: it protects new works and inventions regardless of whether they provide public benefit, while creating unnecessary or cumbersome barriers to their use.<sup>17</sup>

In fact, community often overshadows stuff in creators’ own descriptions of their creative endeavors. For example, music students report that a “sense of belonging” to a community is “the chief[,] and for some, the only, reason they participate in music program[s].”<sup>18</sup> Woodworkers in community programs valued the sense of belonging they received from mentoring and working with others, which overshadowed the physical artifacts of their participation.<sup>19</sup> Fans describe participating in fanwork-creating communities as a sort of “savior,” providing them with community, empowerment, and an enhanced sense of self.<sup>20</sup> Professional artists report a sense of belonging as a key aspect of their creative endeavors that drives them not only to create art, but also to engage in activities that support their artistic communities outside the context of capitalist market transactions.<sup>21</sup>

Furthermore, stuff-focused accounts do little to explain certain common aspects of creator and innovator behavior. Why do “starving artists,” tinkers, and fans create and invent, even when they do not ever intend to pursue financial benefit for doing so? Why do some creators and innovators give their works or inventions away for free or decide not to rely on intellectual property exclusivity? Why do some creators give attribution when the law does not require it or refrain from copying even when the law would permit it?

I suggest that the concept of belonging reveals some of these answers. Belonging is a fundamental need, and the desire to belong is one of the most

15. *Id.*

16. *See id.*

17. *See id.*

18. June Countryman, *High School Music Programmes as Potential Sites for Communities of Practice – A Canadian Study*, 1 *MUSIC EDUC. RES.* 93, 94–95 (2009).

19. Megan L. Ballinger et al., *More Than a Place to Do Woodwork: A Case Study of a Community-Based Men’s Shed*, 6 *J. MEN’S HEALTH* 20, 24 (2009) (discussing how participating in activities such as mentoring at a woodworking-focused “men’s shed” contributed to older men’s senses of belonging and well-being).

20. *See* Rosenblatt & Tushnet, *supra* note 4, at 388.

21. *See generally* Gordon Waitt & Chris Gibson, *The Spiral Gallery: Non-Market Creativity and Belonging in an Australian Country Town*, 30 *J. RURAL STUD.* 75, 76 (2013) (describing operation of an art gallery collective that “operates as a space to facilitate and legitimiz[e] the subjectivities of women and men as artists, to socializ[e], to earn an income[,] . . . to form new community networks, and to generate a sense of ‘belonging’ based on reciprocal relationships of care”).

powerful drivers of human behavior.<sup>22</sup> Empirical evidence indicates that a sense of belonging is frequently a product of creative endeavors that rivals “stuff” in its importance to creators and rivals exclusivity as an incentive to create.<sup>23</sup> Belonging maintains a unique, complicated, and inextricable relationship with the concept of “exclusivity,” which is the principal tool of intellectual property law.<sup>24</sup> By examining belonging – the conditions that promote and undermine it, its relationship with intellectual creation, and its relationship with exclusivity – we can learn much about the relationship between intellectual property law and creative behavior. These lessons can help guide intellectual law and policy in the direction of promoting human flourishing. Belonging thus adds an important consideration to intellectual property policy and theory.

Part II of this Article defines belonging and identifies conditions that are conducive or hostile to the creation of a sense of belonging. Part III explains how belonging is a product of creative endeavors that is different from, but synergistic with, tangible products of creation. Part IV connects belonging with intellectual property law, first explaining how belonging can be incentivized or discouraged just as tangible creations can, and second explaining why belonging matters even in the context of promoting the creation of “stuff.” Finally, Part V identifies some lessons that intellectual property law and policy might draw from examining belonging.

## II. WHY DOES BELONGING MATTER?

Before considering belonging in the context of intellectual property law or policy, it first helps to understand belonging in its own context. This Article therefore begins by defining belonging, explaining why it is important, and exploring the conditions that promote and undermine individuals’ sense of belonging.

### A. Defining Belonging

Belonging is a “personal and contextually-mediated” emotion that people experience when they feel (a) “secure, accepted, included, valued, and respected” by a group; (b) “connected [] or integral to the group”; and (c) that their “values are in harmony” with the group.<sup>25</sup> This experience is a basic,

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22. See *infra* notes 31–37 and accompanying text.

23. See *infra* Part IV.B.1.

24. See, e.g., MERGES, *supra* note 8, at 5.

25. Tracy Levett-Jones & Judith Lathlean, *The Ascent to Competence Conceptual Framework: An Outcome of a Study of Belongingness*, 18 J. CLINICAL NURSING 2870, 2872 (2009). Because the concept of belonging incorporates both a relationship of reciprocal value and a concept of “fit” with the group, having a sense of belonging is not the same as having social relationships – even close relationships. See Nathaniel M. Lambert et al., *To Belong Is to Matter: Sense of Belonging Enhances Meaning in Life*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 1418, 1425 (2013).

and possibly innate, human need.<sup>26</sup> In his seminal work describing a hierarchy of human needs, Maslow ranked the need for belonging below only physiological survival and the need to feel safe and secure.<sup>27</sup> Psychologists describe belonging as a vital component to mental health that derives from the experience of being valued, needed, or accepted and fitting into a system or environment.<sup>28</sup> Sociologists describe it as a relationship between self and society that reflects “a sense of ease with oneself and one’s surroundings.”<sup>29</sup> Social scientists from many disciplines have concluded that a “sense of belonging” is a basic human value.<sup>30</sup>

While individuals differ in how strongly they experience a need to belong, and different cultures emphasize belonging more or less in comparison with other values,<sup>31</sup> many experts consider it to be fundamental and universal across cultures.<sup>32</sup> Belonging both influences and explains human behavior.<sup>33</sup> In fact, research shows that attaining a sense of belonging is more important to well-being than one might initially expect. For example, a sense of be-

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26. See Gregory M. Walton et al., *Mere Belonging: The Power of Social Connections*, 102 J. PERSONALITY & SOC. PSYCHOL. 513, 514 (2011) (discussing studies); Barbara M. Newman & Philip R. Newman, *Group Identity and Alienation: Giving the We Its Due*, 30 J. YOUTH & ADOLESCENCE 515, 520 (2001) (discussing evolutionary basis for a need for a sense of belonging); Tracy Levett-Jones et al., *Belongingness: A Critique of the Concept and Implications for Nursing Education*, 27 NURSE EDUC. TODAY 210, 211–12 (2007) (same).

27. A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 380 (1943); A.H. MASLOW, MOTIVATION AND PERSONALITY 43 (1954).

28. See Bonnie M. Hagerty et al., *Childhood Antecedents of Adult Sense of Belonging*, 58 J. CLINICAL PSYCHOL. 793, 794 (2002) (describing belonging as vital to mental health); Bonnie M. K. Hagerty & Kathleen Patuskay, *Developing a Measure of Sense of Belonging*, 44 NURSING RES. 9, 9–10 (1995) (describing components of belonging experience).

29. See Vanessa May, *Self, Belonging and Social Change*, 45 SOC. 363, 368 (2011). For this reason, belonging is frequently associated with physical location (such as belonging to a particular nationality or geographical community). See *id.* at 371. This Article focuses on the more metaphorical sort of community that exists among people with common interests and values regardless of location, but it should be noted that many of the ideas explored here with regard to intellectual property may be amenable to analysis in the real property context as well. Just as intellectual property law may influence a sense of belonging among communities of creators, real property law may influence a sense of belonging among residents of particular physical locations. Such an exploration is beyond the scope of this Article, however.

30. See Hagerty & Patuskay, *supra* note 28, at 9.

31. See Karen R. Whalley Hammell, *Belonging, Occupation and Human Well-Being: An Exploration*, 81 CANADIAN J. OCCUPATIONAL THERAPY 39, 40–41 (2014).

32. See *id.*; see also Hagerty & Patuskay, *supra* note 28, at 9; Levett-Jones et al., *supra* note 26, at 211.

33. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 487, 497–98, 521 (1995).



longing is strongly tied to whether people find life to be meaningful.<sup>34</sup> When people's sense of social connectedness is threatened, their IQ performance, motivation to achieve, physical health, and even life expectancy decline.<sup>35</sup> Belonging to groups helps reduce the distress of subjective uncertainty, provides stability, and allows people to pursue collective goals.<sup>36</sup> Belonging provides a buffer against the anxiety of self-doubt and can empower people to feel a sense of achievement.<sup>37</sup>

Belonging combines the "I" and the "we" and therefore is closely tied to both identity and community. The experience of belonging provides people with opportunities to "be" and "become" themselves by defining and enacting their own identities by association.<sup>38</sup> Individuals' concepts of themselves derive largely from their social relations,<sup>39</sup> and "part of their self-esteem derives from the groups to which they belong."<sup>40</sup> In creative communities, for example, people define themselves partly by what they make and partly by association with others who make similar types of things.<sup>41</sup> Participation in creative communities provides people with belonging, which, in turn, provides them with both self-definition and self-worth.<sup>42</sup>

Like identity, community both defines and is defined by belonging.<sup>43</sup> Psychologists define community as "the perception of similarity with others, an acknowledged interdependence with others, a willingness to maintain this interdependence by giving to or doing for others what one expects from them, [and] the feeling that one is part of a larger dependable and stable struc-

34. See generally Lambert et al., *supra* note 25.

35. See Walton et al., *supra* note 26, at 513–15 (noting examples of belonging's positive impact on people, including increased IQ and longer life, and discussing motivation to achieve studies); Levett-Jones et al., *supra* note 26, at 213 (discussing studies).

36. See Lambert et al., *supra* note 25, at 1419–20.

37. See Matthew T. Crawford & Lucy Salaman, *Entitativity, Identity, and the Fulfilment of Psychological Needs*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 726, 727–29 (2012).

38. See Waitt & Gibson, *supra* note 21, at 77 (describing the relationship between belonging and becoming); Wolfgang Steinel et al., *How Intragroup Dynamics Affect Behavior in Intergroup Conflict: The Role of Group Norms, Prototypicality, and Need to Belong*, 13 GROUP PROCESSES & INTERGROUP REL. 779, 780 (2010) (noting that people define themselves by association).

39. Newman & Newman, *supra* note 26, at 517–18.

40. Emanuele Castano et al., *I Belong, Therefore, I Exist: Ingroup Identification, Ingroup Entitativity, and Ingroup Bias*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 135, 136 (2002).

41. See, e.g., Waitt & Gibson, *supra* note 21, at 78 (describing how belonging in creative context facilitated self-actualization).

42. See Walton et al., *supra* note 26, at 514.

43. See Terri Mannarini et al., *How Identification Processes and Intercommunity Relationships Affect Sense of Community*, 40 J. COMMUNITY PSYCHOL. 951, 952 (2012).

ture.”<sup>44</sup> In modern Western society, a sense of community tends to develop among people with shared interests and tends to satisfy community members’ need for belonging.<sup>45</sup> For a community to persist, members must find the association rewarding – for example, they may derive status, acceptance, success, or a sense of competence from belonging to the community.<sup>46</sup>

Belonging is also a major motivator of behavior.<sup>47</sup> People who experience belonging are likely to trust members of a shared community<sup>48</sup> and adopt goals and norms from their communities of interest. This collective norm-adoption influences not only members’ public behavior, but also their internally held beliefs about nearly everything – even what they find interesting.<sup>49</sup> People who experience belonging are more motivated to achieve than those who do not.<sup>50</sup> For example, one study found that when students discovered even minor social commonalities with a math major – such as discovering that they shared a birthday – their interest in math increased.<sup>51</sup>

Belonging maintains a complicated relationship with notions of exclusivity. On one hand, the idea that one may belong to a particular group necessarily implies that others do not.<sup>52</sup> Many people experience belonging by comparing themselves to or setting themselves apart from an out-group<sup>53</sup> and tend to view the norms and members of their in-groups more favorably than those of their out-groups.<sup>54</sup> On the other hand, belonging is not necessarily oppositional and does not necessarily demand a comparison with outsiders. Studies show that experiencing belonging requires an awareness of a connection between self and group and is enhanced by perceiving a group as a real

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44. Patricia Obst et al., *Sense of Community in Science Fiction Fandom, Part 1: Understanding Sense of Community in an International Community of Interest*, 30 J. COMMUNITY PSYCHOL. 87, 88 (2002) (quoting SEYMOUR B. SARASON, *THE PSYCHOLOGICAL SENSE OF COMMUNITY: PROSPECTS FOR A COMMUNITY PSYCHOLOGY* 157 (1977)).

45. *Id.* at 89.

46. *Id.*

47. See generally Walton et al., *supra* note 26.

48. See Ling Zhao et al., *Cultivating the Sense of Belonging and Motivating User Participation in Virtual Communities: A Social Capital Perspective*, 32 INT’L J. INFO. MGMT. 574, 578 (2012).

49. Walton et al., *supra* note 26, at 513.

50. *Id.* at 529.

51. *Id.* at 521.

52. Obst et al., *supra* note 44, at 89.

53. Castano et al., *supra* note 40, at 136.

54. See Bastian Schiller et al., *Intergroup Bias in Third-Party Punishment Stems from Both Ingroup Favoritism and Outgroup Discrimination*, 35 EVOLUTION & HUM. BEHAV. 169, 173–74 (2014). As a result, some scholars, many inspired by the work of Pierre Bourdieu, have appropriately critiqued systems of belonging as tending to inhibit social mobility and promote unjust power structures. See, e.g., PIERRE BOURDIEU AND PHYSICAL CULTURE 15–18 (Iisahunter et al. eds., 2014).

entity (a quality known as “entitativity”).<sup>55</sup> For this reason, belonging’s boundaries need not be rigid. Different people may draw different boundaries around the same groups, and people can belong to multiple groups at once.<sup>56</sup> For example, people may hold separate identities associated with their nationality and their religion and feel a sense of belonging in each community.<sup>57</sup> In the context of intellectual creation, people can belong to groups with their own copying and attribution norms and follow the law at the same time, as long as the law and norms do not conflict with each other.<sup>58</sup>

Finally, belonging is personal. Although belonging is socially-mediated, individuals define it based on their own experiences.<sup>59</sup> Thus, individuals often draw their own boundaries of belonging rather than relying on boundaries drawn by others.<sup>60</sup> This is not to say that belonging lacks power dynamics or gatekeepers. Often the question of belonging is tied up with questions of authenticity or qualification that can exclude people, sometimes unnecessarily or unfairly. Some groups have gatekeepers who define who is “in” and who is “out” (or at least purport to do so), and those gatekeepers can act as meaningful barriers to belonging. Other groups depend on threshold conditions such as attaining a particular academic degree or professional qualification. But in its most basic form, one need not necessarily be accepted by all – or even any – members of a group to experience belonging. One need only *perceive* acceptance, inclusion, value, respect, connection, and “fit.” This will depend largely on the individual’s subjective experience of interactions with in-group and out-group members. For most, it will depend in part on how the group defines itself, but it need not. Therefore, not only may a group’s boundaries be fluid, but different members may define the group differently.

This personal nature means that firms (such as corporations, associations, or partnerships) cannot experience belonging. Firms are, of course, made of individuals who experience emotion. But firms cannot, as unitary

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55. See Lowell Gaertner et al., *Us Without Them: Evidence for an Intragroup Origin of Positive In-Group Regard*, 90 J. PERSONALITY & SOC. PSYCHOL. 426, 428, 436 (2006) (discussing complications in literature); Castano et al., *supra* note 40, at 136.

56. See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 8 (1963); May, *supra* note 29, at 370.

57. See Francesco Belvisi, *Legal Pluralism and Problems of Legal Application* 3–4 (Univ. of Leicester Sch. of Law, Research Paper No. 14-05, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400096](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400096).

58. See MURRAY, PIPER & ROBERTSON, *supra* note 9, at 110–31.

59. See Lambert et al., *supra* note 25, at 1418 (“[S]atisfying a general need for positive social relationships . . . does not guarantee the subjective experience of belonging.”).

60. Being ostracized from a group, however, undermines a sense of belonging and causes great emotional pain as a result. See Kipling D. Williams & Lisa Zadro, *Ostracism: The Indiscriminate Early Detection System*, in *THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING* 19, 19–34 (2005).

entities, experience emotion on their own. To the extent that emotional concerns have any influence on firms at all, they do so only indirectly and are mediated and diluted by variation among individual members. There is little reason to expect that all of the individuals comprising a particular firm will desire to belong to any particular group, other than (probably) the firm itself. Thus, a firm cannot be as consistently driven by a desire to belong and cannot attain the same belonging benefits as an individual. Firms certainly *use* and benefit from individuals' sense of belonging – members of a firm may experience a sense of belonging with their colleagues and may perform better as a result, and customers of a firm may experience a sense of belonging among themselves (as fans often do, for example) through their connection with the firm's products or services. Both of these types of belonging undoubtedly benefit the firm greatly. But the firm itself cannot experience belonging.

The discussion above shows that belonging is a motivator and a fundamental need that individuals experience as intertwined with their senses of self and community. The following section discusses how individuals create belonging, what conditions promote belonging, and what conditions undermine it.

### B. Creating and Undermining Belonging

Belonging is born of interaction. People develop the basic components of belonging – mutual acceptance, inclusion, value, respect, connection, and “fit” with the group's values – when they interact with and become visible to group members.<sup>61</sup> Developing the sense of comfort required for belonging usually requires repeated or prolonged interaction, but this interaction need not take place in person; in fact, studies show that a strong sense of community can form without geographic proximity and in the absence of regular face-to-face contact.<sup>62</sup>

Studies show that several conditions strongly promote the development of a sense of belonging.<sup>63</sup> First, belonging tends to develop in communities of shared endeavor. When community members work on related tasks, engage in creative collaboration, or strive toward a shared goal, they are more likely to experience belonging.<sup>64</sup> Researchers hypothesize that a sense of shared endeavor provides participants with a feeling of group legitimacy and common identity that inspires members to participate, gives meaning to their actions, and results in the development of relationships that foster a sense of

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61. See Newman & Newman, *supra* note 26, at 521; Talja Blokland & Julia Nast, *From Public Familiarity to Comfort Zone: The Relevance of Absent Ties for Belonging in Berlin's Mixed Neighbourhoods*, 38 INT'L J. URB. & REGIONAL RES. 1142, 1155 (2014) (describing importance of recognition to experience of belonging).

62. Obst et al., *supra* note 44, at 97.

63. See *infra* notes 64–84 and accompanying text.

64. See, e.g., Countryman, *supra* note 18, at 98.

belonging.<sup>65</sup> To the extent the group's core behavior is a particular sort of creative endeavor, therefore, participants in that endeavor may develop a sense of belonging by creating or contributing to that type of work or invention.

Second, individuals are more likely to develop and maintain a sense of belonging when they have the opportunity to participate in decision-making (for themselves or for the group as a whole) about the shared endeavor, which provides not only a sense of membership in the group, but also a sense of informal "ownership" over the group and its creative products.<sup>66</sup> Thus, a sense of belonging is not merely the result of individuals internalizing shared conditions, but the result of individuals contributing in some way to those conditions.<sup>67</sup>

Third, for a community to persist, members must also find the association rewarding. Being recognized and acknowledged as a member of a community is a dominant form of reward that both promotes a sense of belonging and motivates participation in the group.<sup>68</sup> Other important rewards include status, acceptance, success, or a sense of competence from belonging to the community.<sup>69</sup> I suggest that this need for reward may be one reason why members of creative communities persist in creating: not (only) because they crave financial remuneration, but (also) because they crave the reward of acceptance, acknowledgement, competence, and the resulting sense of belonging that comes from creating and having one's work recognized or appreciated by community members. Studies support this: people create in order to belong to creative communities, and their experience of belonging

65. See *id.* at 98, 107 (describing roles of shared endeavor, mutual engagement, and creative collaboration in forming community).

66. See May, *supra* note 29, at 369 (discussing importance of ability to make decisions in fostering belonging). See also Countryman, *supra* note 18, at 102–03, 107 (describing role of self-direction and autonomy in creative decision-making in creating a sense of belonging among music students); Matthew D. Thibeault, *From Compliance to Creative Rights in Music Education: Rethinking Intellectual Property in the Age of New Media*, 14 MUSIC EDUC. RES. 103, 109–10 (2012) (discussing how self-directed creative access to copyrighted materials enhances music students' sense of belonging).

67. See May, *supra* note 29, at 369.

68. See Samuel Pehrson et al., *Is Everyone Irish on St. Patrick's Day? Divergent Expectations and Experiences of Collective Self-Objectification at a Multicultural Parade*, 53 BRIT. J. SOC. PSYCHOL. 249, 250 (2014) (noting that having one's identity acknowledged promotes belonging and participation); Blokland & Nast, *supra* note 61, at 1155 (finding that "recognizing and being recognized" creates a "comfort zone" that allows people to experience a sense of belonging).

69. David W. McMillian & David M. Chavis, *Sense of Community: A Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 6, 13 (1986); see also Pehrson et al., *supra* note 68, at 250.

motivates them to create.<sup>70</sup> Belonging is more consistent with cooperation and sharing than with competition or secrecy.<sup>71</sup>

Finally, belonging is synergistic with shared values and mutual trust. When group members share uniform beliefs, they are more likely to feel belonging,<sup>72</sup> and people who share values with a community are more likely to experience a sense of belonging in that community.<sup>73</sup> Relatedly, people who experience a sense of belonging with a community tend to shape,<sup>74</sup> adopt,<sup>75</sup> and enact the values of that community,<sup>76</sup> which, in turn, reinforces their sense of belonging with the community.<sup>77</sup> Without shared values, communities are less able to withstand forces that would pull them apart, so the survival of a community of belonging depends on a “degree of ‘commitment to a set of shared values.’”<sup>78</sup> People’s feeling of belonging correspondingly erodes when they are asked (by the community or an outsider) to comply with norms that do not conform to their own.<sup>79</sup> Similarly, mutual trust is a major aspect of belonging.<sup>80</sup> When community members are able to trust each other to follow established norms and rules, it fosters a sense of belonging among members.<sup>81</sup> Lack of trust is a major barrier to the forming of communities of belonging.<sup>82</sup>

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70. See, e.g., Countryman, *supra* note 18, at 98–99; Walton et al., *supra* note 26, at 529.

71. See, e.g., Carolin Haeussler, *Information-Sharing in Academia and the Industry: A Comparative Study*, 40 RES. POL’Y 105, 106, 117 (2011) (noting that academic scientists more often hold pro-sharing norms, while industry scientists more often share information only on a reciprocal basis).

72. See Samuel Stroope, *How Culture Shapes Community: Bible Belief, Theological Unity, and a Sense of Belonging in Religious Congregations*, 52 SOC. Q. 568, 580 (2011).

73. See *id.* at 573; Antony Zogg & Tony Hooper, *Does the Need to Belong Drive Risky Online Behavior?*, in PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS MANAGEMENT AND EVALUATION 328 (2013).

74. See Pehrson et al., *supra* note 68, at 250 (“[B]ehaviour actively shapes group norms in a deliberate way rather than merely following them . . .”).

75. See Newman & Newman, *supra* note 26, at 520, 524.

76. See Steinel et al., *supra* note 38, at 781.

77. See *id.*

78. See Stroope, *supra* note 72, at 573 (quoting Amitai Etzioni, *Is Bowling Together Sociologically Lite?*, 30 CONTEMP. SOC. 223, 224 (2001)).

79. See Levett-Jones et al., *supra* note 26, at 215–16.

80. See Zhao et al., *supra* note 48, at 578; Jackie Lawson et al., “*It’s Like Having a Day of Freedom, a Day Off from Being Ill*”: Exploring the Experiences of People Living with Mental Health Problems Who Attend a Community-Based Arts Project, Using Interpretative Phenomenological Analysis, 19 J. HEALTH PSYCHOL. 765, 774 (2014).

81. See, e.g., Hsiu-Fen Lin, *Determinants of Successful Virtual Communities: Contributions from System Characteristics and Social Factors*, 45 INFO. & MGMT. 522, 523, 526 (2008).

82. See Lawson et al., *supra* note 80, at 766.

Just as some conditions promote belonging, others inhibit it. Individuals who experience ostracism or exclusion are less likely to experience belonging,<sup>83</sup> and gatekeepers who impose (or purport to impose) qualifications for community membership or engagement in shared endeavors can therefore frustrate belonging for those who do not meet gatekeepers' qualifications. Exclusivity can enhance entitativity (and hence, a sense of belonging) for those within the group,<sup>84</sup> but it can create barriers to group entry and discourage a sense of belonging for those who have difficulty breaking in.

These suggest that creative communities are often well-suited to developing belonging: they unite people around types of creative endeavors, and they provide opportunities for people to experience a sense of competence and accomplishment. It seems, however, that some sorts of creative communities are more likely than others to foster a sense of belonging: those that provide opportunities for recognition, collaboration, and status, and those that embrace shared norms and facilitate trust among members. The following section discusses belonging as an intellectual creation similar to, but different from, the "stuff" creators make when they engage in creative endeavors.

### III. BELONGING AS INTELLECTUAL AND SOCIAL CREATION

Empirical evidence shows that participants in creative endeavors often experience a sense of belonging as a result of their participation. For example, studies of community arts programs show that participants experience a sense of belonging and attain a sense of empowerment drawn from gaining an identity as an artist within a community.<sup>85</sup> Studies of science fiction and media fans show that individuals who engage in creative fandom, such as writing fan fiction, experience a sense of belonging and identity as a result.<sup>86</sup> A study of a regional art gallery established that the participants who worked there experienced a powerful sense of belonging and identity that fueled their participation in gallery activities.<sup>87</sup> Case studies of open source software writers,<sup>88</sup> roller derby participants,<sup>89</sup> wiki contributors,<sup>90</sup> chefs,<sup>91</sup> scholars,<sup>92</sup>

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83. See Williams & Zadro, *supra* note 60, at 19–34.

84. See Castano et al., *supra* note 40, at 136; Gaertner et al., *supra* note 55, at 428, 436.

85. See, e.g., Lawson et al., *supra* note 80, at 766; Anne W. Lipe et al., *The Effects of an Arts Intervention Program in a Community Mental Health Setting: A Collaborative Approach*, 39 ARTS PSYCHOTHERAPY 25, 26, 29 (2012).

86. See Org. for Transformative Works, *supra* note 4, at 24–25, 34–38 (describing fans' uses of follow-on creation to build and understand their own identities); Obst et al., *supra* note 44, at 97; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 140 (2007) [hereinafter Tushnet, *Payment in Credit*] (discussing community among creators of fan fiction).

87. See generally Waite & Gibson, *supra* note 21.

88. See Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There Are More P2P Software Providers Than Ever Before)*, 35

and athletes<sup>93</sup> demonstrate that participants value the sense of community and belonging that these endeavors create. In interviews and performances, pop musicians, such as Lady Gaga and Viktoria Modesta, have described their work and success as giving them a sense of belonging.<sup>94</sup>

Much of this evidence comes from studies of very specific creative communities, but the studies span across a wide range of endeavors. In fact, in qualitative interviews, a wide variety of types of creators and inventors describe themselves in terms that recall less the “hero-inventor or romantic

COLUM. J.L. & ARTS 57, 102 (2011) (identifying “strong norms in the software development community that promote sharing [software secrets] with the world”).

89. See David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1108–10 (2012).

90. See Jon Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 106–11 (2010) (discussing community value of sharing and curation in wiki and Internet communities; indeed, among wiki contributors, community holds an even higher value than attribution).

91. See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 193–94 (2008) (arguing that recipes are better protected by self-enforced social norms than by intellectual property law and also discussing the community of sharing and hospitality norms among chefs).

92. See Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in UNIVERSITY ENTREPRENEURSHIP AND TECHNOLOGY TRANSFER: PROCESS, DESIGN, AND INTELLECTUAL PROPERTY 93, 108–09 (2005) (describing community-enforced penalties for failing to share among academic scientists, including “loss of esteem” and “denial of the scarce resources of research funding and attention”).

93. See Gerard N. Magliocca, *Patenting the Curve Ball: Business Methods and Industry Norms*, 2009 BYU L. REV. 875, 876–77 (discussing effects on innovation of community among athletes).

94. See *Channel4 Presents Latest Collaboration with World’s First Bionic Pop Artist*, CHANNEL4 (Dec. 12, 2014), <http://www.channel4.com/info/press/news/channel-4-presents-worlds-first-bionic-pop-artist> [hereinafter *First Bionic Pop Artist*]; see also Jennifer Newton, *Channel 4 Blows £200,000 on X Factor Final Advert Featuring One-Legged Singer in Dig at Cowell’s “Painfully Dull Manufactured Pop,”* DAILY MAIL (Dec. 12, 2014), <http://www.dailymail.co.uk/news/article-2871399/Channel-4-spend-200-000-X-Factor-final-advert-featuring-disabled-singer-riposte-painfully-dull-manufactured-pop.html>; see also Fay Strang, *EXCLUSIVE: “My Intention Was to Put Art Culture into Pop Music”*: Lady Gaga Reveals She Aimed to “Reverse Warhol” in *New Record*, DAILY MAIL (Nov. 4, 2013), <http://www.dailymail.co.uk/tvshowbiz/article-2486872/Lady-Gaga-reveals-aimed-reverse-Warhol-new-album-ARTPOP.html> (“We sort of like to say if we can belong together you and I, or me and my fans – if we can belong together in this room and make love then maybe our dream of these two things – art and pop – belonging together, maybe that could come true.”); Christina Delarge, *Forget All of Your Insecurities (English Subtitles) – Lady Gaga*, YOUTUBE (July 5, 2012), <https://www.youtube.com/watch?v=gNaTkvxKYwI> (urging fans to reject insecurities that make them feel they don’t belong; indicating that her career has made her feel a sense of belonging and empowerment).



creator than the person who is driven to be part of a collective, desiring the prestige and worth of working together toward common ends.”<sup>95</sup> Creators see their work as contributing to a “collective whose reputation originates and grows through intimate association and membership.”<sup>96</sup> This is true for fields generally considered dependent on formal intellectual property incentives (e.g., popular music)<sup>97</sup> and endeavors generally considered governed by “low-IP” community norms (e.g., open source software, roller derby, wikis, haute cuisine).<sup>98</sup> So it is fair to generalize that one possible consequence of pursuing creative endeavors is a sense of belonging that can rival financial remuneration in terms of its importance and benefit to the creators.

This result may seem intuitive when it comes to hobbyists, but it is true even of commercial creative endeavors. For example, research into regional commercial arts production shows that creativity and creative communities can have collective and collaborative dimensions that make creativity “a means to enhance interaction rather than (‘just’) interaction as a means to enhance creativity.”<sup>99</sup> I do not mean to suggest that the desire to belong is the *only* motivating force for these creators or that every one of these creators experiences a sense of belonging – but for at least some, “matters of the market such as paying rent, selling artworks and funding materials acquisition are only part of a mix of motivations, attitudes and practices,” and financial needs are often “downplayed or overridden by ways of doing things that are often consciously chosen for reasons that have nothing to do with money.”<sup>100</sup>

Considering the discussion above of conditions conducive to developing a sense of belonging, this result should not be surprising. Engaging in creation usually means engaging in shared endeavors:<sup>101</sup> working toward solutions to similar problems and making the same types of works. Creating provides opportunities for competence, recognition, status, and acceptance, not only among creators, but also between creators and their audiences or customers. Creative endeavors can provide opportunities for repeated and pro-

95. SILBEY, EUREKA MYTH, *supra* note 9, at 159–60.

96. *Id.* at 160.

97. *See, e.g.*, Thibeault, *supra* note 66, at 104–05 (discussing the creation of music and its subsequent reuse or remix by additional artists).

98. *See, e.g.*, Fagundes, *supra* note 89, at 1108 (recognizing the roller derby community as one where people share similar interests and develop close friends); Fauchart & von Hippel, *supra* note 91, at 193–94 (detailing how information is passed from chef to chef according to industry norms); Garon, *supra* note 90, at 102–07 (discussing the role of community members in attributing to and curating wiki sites); Giblin, *supra* note 88, at 102 (“[T]here are also strong norms in the software development community that promote sharing them with the world.”).

99. Waitt & Gibson, *supra* note 21, at 77 (quoting Robyn Mayes, *Postcards from Somewhere: “Marginal” Cultural Production, Creativity and Community*, 41 AUSTRALIAN GEOGRAPHER 11, 19 (2010)).

100. *Id.*

101. *See* Countryman, *supra* note 18, at 99.

longed exposure to other creators and innovators and the development of shared values.

Creative endeavors also enable the sort of collaborative work that is particularly effective at promoting a sense of belonging among participants.<sup>102</sup> Collaboration provides interdependence and opportunities for mutual trust, and studies of creative communities show that people engaged in collaborative activities find them more meaningful than independent activities; for example, studies involving high school students show that the experience of making music with others generates a sense of community and belonging.<sup>103</sup> No doubt, some creators toil in isolation. But while overt collaboration may be particularly fertile ground for developing belonging, belonging may still grow for relatively isolated creators because no creator is truly alone. Even the most solitary author, artist, or inventor cannot help but encounter larger contexts of shared endeavor. Their audiences, funding sources, or distribution gatekeepers will apply common standards of quality, such as entertainment, usefulness, or marketability. A virtue of endeavors that requires the sort of dedicated practice that creation and innovation demand is that they bind people around shared standards, fostering a sense of belonging even among non-collaborative makers.<sup>104</sup> In other words, by engaging in creative endeavors, one naturally situates oneself within a larger community and can derive a sense of belonging from that implicit (or explicit) relationship.

Creative endeavors provide opportunities to engage with a larger creative community or network that can provide identity creation and self-empowerment. Sometimes the relationship between belonging, community, and identity is easy to see; for example, people who create characters in multi-player games or who create self-insertion fanworks create alternative versions of themselves as part of community-focused creative endeavors.<sup>105</sup> But the synergistic effects of creation, identity, and belonging are also documented in less-obvious contexts; for example, studies of artists have demonstrated that creating as an individual member of a larger community provided participants with the identity of “artist,” sustained artists’ sense of self, and made belonging possible.<sup>106</sup> Popular singer/songwriter Viktoria Modesta, who is an

102. See, e.g., Lipe et al., *supra* note 85, at 28.

103. See Hammell, *supra* note 31, at 43; see generally Countryman, *supra* note 18.

104. Silbey, *Promoting Progress*, *supra* note 7, at 527 (describing the argument made in Alasdair MacIntyre’s groundbreaking *After Virtue*).

105. See Casey Fiesler, *Pretending Without a License: Intellectual Property and Gender Implication in Online Games*, 9 BUFF. INTELL. PROP. L.J. 1, 17 (2013) (discussing creation of characters in the Milliways Bar game, where users collectively make a single journal-style work by interacting in a game world as characters from other works); Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 608–09 (2007).

106. See Lawson et al., *supra* note 80, at 766; Lipe et al., *supra* note 85, at 26, 29; Waitt & Gibson, *supra* note 21, at 83–84.

amputee, explains that her stylized musical commentary on beauty and disability situates her “in mainstream pop-culture, . . . where I have always known I belonged.”<sup>107</sup>

Just as creators may find belonging among communities of creators and consumers may find belonging among communities of consumers (for example, among fans of a particular work or genre or users of a particular technology), the decision to disseminate works can foster a sense of connection between creator and audience.<sup>108</sup> This blurs the already-amorphous boundary between creator and consumer,<sup>109</sup> facilitates autonomy and self-determination, and promotes community expertise and competence among creators and consumers alike.<sup>110</sup> Most notably, consumers may develop a sense of belonging by creating: participating in or contributing to another creator’s work by commenting or building on it (e.g., creating fanworks or engaging in other commentary) or participating in crowdsourcing or crowdfunding of projects.<sup>111</sup> In particular, crowdfunding fosters a sense of belonging by providing a sense of personal connection with the creator, a sense of shared endeavor with the creator and other donors, a sense of having engaged in creative decision-making by deciding to support a particular project or projects, and often some sort of recognition in product credits.<sup>112</sup> Contributing thus connects the donor and the creator, giving the donor a sense of emotional “ownership” in the project and a sense of belonging with its creator and other donors without generating any formal ownership rights in the resulting intellectual property.

Creative endeavors also provide opportunities for mobility among communities of belonging. For example, makers of fanworks are “playing in someone else’s sandbox,” a vivid metaphor for including oneself in a category with the original creator.<sup>113</sup> Thus, fanwork makers may experience belonging in multiple communities: a community of fans who love particular fictional characters, as well as a larger community of those who create works

107. See *First Bionic Pop Artist*, *supra* note 94. See also Newton, *supra* note 94.

108. This belonging can be a two-way street, although it is not always: artists like Lady Gaga have described how they feel connected to their consumers, but even more often, consumers develop a sense of connection with the creators whose works and inventions they use and appreciate. See, e.g., SILBEY, EUREKA MYTH, *supra* note 9, at 26; Strang, *supra* note 94.

109. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 57–68 (2008) (discussing rise in recognition of “read/write” culture).

110. See SILBEY, EUREKA MYTH, *supra* note 9, at 262–69.

111. *Id.*; see also LESSIG, *supra* note 109, at 65; Chander & Sunder, *supra* note 105, at 608–09.

112. See David Dupee, *Investing to Belong: Equity Crowdfunding and Return on Investment*, JUNKYARD CHARTERER (Jan. 16, 2013), <http://junkyard-charterer.blogspot.com/2013/01/investing-to-belong-equity-crowdfunding.html>.

113. See Fiesler, *supra* note 105, at 7 (discussing widespread use of sandbox metaphor to describe fanwork creation).

relating to those characters.<sup>114</sup> Creation of the work may well be secondary to the desire to exist within the sandbox. People may create to legitimize belonging and identity as part of a particular group: “Artist.” “Writer.” “Musician.” “Inventor.”

Creators can obtain legitimacy, recognition, and even a sort of immortality by association with other creators.<sup>115</sup> By making, creators situate themselves in communities of makers,<sup>116</sup> and belonging to a community or network allows them to feel a part of a larger symbolic entity that expands the boundaries of their own selves.<sup>117</sup> This is consistent with studies establishing that when people are reminded of their mortality or uncertainty about their futures, their need for a sense of belonging grows, and they associate more closely with their communities.<sup>118</sup> Group membership provides a symbolic identity that allows people to project themselves beyond their personal death.<sup>119</sup> Therefore, creators alleviate their fear of mortality by creating works that strengthen their bonds with the community and satisfy their need for a sense of belonging.

The importance of engaging with something larger and longer-lived than oneself may be seen in the value that many creators place on attribution: they value the immortality of their work and the reputation it provides.<sup>120</sup> Creators and innovators identify with their work, and that work not only secures their places in creative communities, but also has the potential to make lasting contributions to those communities.<sup>121</sup> Attribution permits creators to identify themselves “as belonging within a particular professional space and to a particular product.”<sup>122</sup> While creators’ desire for attribution does not directly implicate their desire to belong, it reflects that at least some creators crave persistent and non-monetary acknowledgement of their role in creating their work. That acknowledgement not only builds reputation, but, as described

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114. *See id.*

115. *See, e.g.,* Waitt & Gibson, *supra* note 21, at 80–81; Lambert et al., *supra* note 25, at 1419.

116. *See, e.g.,* Karen E. Wohlwend, *Damsels in Discourse: Girls Consuming and Producing Identity Texts Through Disney Princess Play*, 44 *READING RES. Q.* 57, 62 (“Children use play to form affiliations in the local peer culture where they strategically use popular media as cultural capital.”); Waitt & Gibson, *supra* note 21, at 84 (participation in the gallery enabled “transformations in personal and professional identity” and “generated a sense of belonging that amongst many participants expressed as being empowered, and not condemned to a life in the margins”).

117. *See* Lambert et al., *supra* note 25, at 1419–20.

118. Castano et al., *supra* note 40, at 136–37; Hogg et al., *Uncertainty, Entitativity, and Group Identification*, 43 *J. EXPERIMENTAL SOC. PSYCHOL.* 135, 140 (2007).

119. Castano et al., *supra* note 40, at 140.

120. *See* Silbey, *Promoting Progress*, *supra* note 7, at 528 (noting literature on the importance of attribution in the arts and sciences).

121. *See* SILBEY, *EUREKA MYTH*, *supra* note 9, at 168.

122. *See id.*

above, also provides recognition that enables the creator to maintain a self-identity as a creator and a member of a community or network of creators.<sup>123</sup>

This is not to say that participating in creative endeavors always generates belonging or that every individual who endeavors to create or invent will necessarily reap a sense of belonging from it. Creating apart from a community provides fewer opportunities for belonging than creating within one, and indeed, even participating in a creative community may not result in a sense of belonging. Considering the subjectivity of belonging, some individuals may simply not experience acceptance, connection, or fit, even when others would. In addition, participants may be shunned or rejected from creative communities, sometimes for arbitrary reasons. For example, individuals may embody traits that some group members aggressively do not accept. A few visible examples demonstrate this phenomenon: certain men have publicly rejected female and trans participants in game development communities;<sup>124</sup> in certain types of fan communities, women, girls, and people of color are rejected or held to greater standards of authenticity than male participants;<sup>125</sup> and “independent” academics unaffiliated with institutions may be excluded from opportunities for belonging, such as academic conferences, because of pro-institution bias on the part of organizers.<sup>126</sup> This experience of rejection can be very painful and frustrating. Moreover, individuals may make (or be perceived as making) decisions that do not reflect the collective values of a group. For example, in certain artistic and musical circles, creators may be rejected as “sellouts” if they elect to take advantage of markets and formal intellectual property protections.<sup>127</sup>

However, even in these instances, rejected individuals may find belonging in alternative creative communities. So-called “sellouts” may find a sense of belonging in more commercially oriented art or music communities.

123. See Silbey, *Promoting Progress*, *supra* note 7, at 528–29 (noting that attribution helps in “building community and maintaining on-going relations,” as well as establishing reputation).

124. See generally Cherie Todd, *GamerGate and Resistance to the Diversification of Gaming Culture*, 29 *WOMEN’S STUD. J.* 64 (2015); Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, *WASH. POST* (Oct. 14, 2014), [https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm\\_term=.85f4d499efdd](https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm_term=.85f4d499efdd).

125. See generally Joseph Reagle, *Geek Policing: Fake Geek Girls and Contested Attention*, 9 *INT’L J. COMM.* 2862 (2015); Noah Berlatsky, “Fake Geek Girls” *Paranoia Is About Male Insecurity, Not Female Duplicity*, *ATLANTIC* (Jan. 22, 2013), <http://www.theatlantic.com/sexes/archive/2013/01/fake-geek-girls-paranoia-is-about-male-insecurity-not-female-duplicity/267402/>.

126. See Robin Wilson, *Some Ph.D.’s Choose to Work Off the Grid*, *CHRON. HIGHER EDUC.* (Jan. 21, 2013) (discussing challenges faced by independent academics).

127. See, e.g., *Crass: Capitalist Traitors Using Copyright Laws Against Anarcho-Punk.Net - 3000 Albums Deleted Because of These Greedy Selfish Sellout Bastards*, *ANARCHO-PUNK.NET* (July 18, 2012, 8:43 PM), <http://www.anarcho-punk.net/viewtopic.php?f=6&p=61407>.

In media fandom and certain academic disciplines, new creative communities have grown among “outsiders” and provided belonging and legitimacy to those individuals.<sup>128</sup> Social media outlets have facilitated community development among creators who might otherwise feel isolated from dominant culture.<sup>129</sup> In other words, certain communities may have gatekeepers, but the very act of engaging in a creative endeavor provides opportunities for alternative forms of belonging. So long as gatekeeping does not prevent individuals from undertaking creative endeavors, those endeavors have the potential to generate a sense of belonging.

Belonging is not the inevitable result of creative endeavor, however, and intellectual property law has the potential to disrupt opportunities for belonging in the creative context. If the law prevents individuals from undertaking particular shared endeavors or from engaging in creative decision-making, the law stands in the way of opportunities to gain a sense of belonging through those endeavors. If the law disrupts opportunities for creators to interact, or otherwise discourages reciprocal recognition and acknowledgement of creators’ work, it fails to provide the opportunities for status and success. If the law conflicts with a creative community’s values, it undermines the shared values and mutual trust that promote a sense of belonging among members. The following section discusses in more detail the potential relationships between intellectual property law and a sense of belonging.

#### IV. WHAT DOES BELONGING HAVE TO DO WITH INTELLECTUAL PROPERTY LAW?

I suggest that belonging has both a cause and effect relationship with intellectual creation. The following section explores both sides of this relationship. First, it explores the ways in which the laws and norms that govern creative and innovative behavior can also promote or undermine individuals’ sense of belonging. Second, it explores ways in which individuals’ sense of belonging can influence how they create inventions, works of authorship, and marks – the “stuff” more traditionally associated with intellectual property law.

##### *A. Intellectual Property Law Can Promote or Undermine Belonging*

Discourse about intellectual property law has long taken a predominantly stuff-focused approach, exploring how best to maximize the quality or quantity of the physical products of creation. Perhaps this focus is inevitable,

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128. See, e.g., Org. for Transformative Works, *supra* note 4, at 15–17, 22–26 (discussing fan communities); *Mission*, RONIN INST., <http://ronininstitute.org/mission/> (last visited Feb. 25, 2017) (describing model of “using online tools to connect independent scholars, allowing them to share and critique each other’s ideas, find and develop collaborations, and share their experiences”).

129. See Org. for Transformative Works, *supra* note 4, at 15–17, 22–26.

considering that from a constitutional perspective, intellectual property law exists to advance the progress of science and the useful arts (for copyrights and patents) or to regulate commerce (for trademarks).<sup>130</sup> It also reflects the undeniable truth that “stuff” is far easier to measure than human-flourishing benefits such as belonging.<sup>131</sup>

But we do humanity a disservice by focusing only on tangible production and ignoring other notions of human flourishing.<sup>132</sup> As demonstrated above, belonging is a crucial aspect of human flourishing that maintains a complicated relationship with exclusivity – the chief operational tool of intellectual property law. Although there may often be a synergy between stuff-creation and belonging-creation, it is not a one-to-one relationship. It is no doubt possible for people to create stuff without deriving much, or even any, sense of belonging from the process.<sup>133</sup> Reams of intellectual property scholarship have explored how best to encourage creation and innovation without reference to belonging at all. But while it is at least theoretically possible to create stuff without creative communities, it is more difficult to create belonging without creative communities. Creative communities generate the experiences of competence, recognition, and reward, each of which promotes belonging. Thus, to the extent the law promotes creating in the context of communities, it also likely promotes a sense of belonging. To the

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130. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”); *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980) (describing the objective of the patent monopoly as existing so that “[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy” (alteration in original) (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974))); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“‘The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.’ It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.” (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))). See also *In re Trade-Mark Cases*, 100 U.S. 82, 94–95 (1879) (describing utilitarian incentive justification for trademark law); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 *HAMLIN L. REV.* 65, 65 n.5 (1997) (noting that Thomas Jefferson explicitly disavowed any natural-law underpinning of intellectual property rights); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 *U.C. DAVIS L. REV.* 465, 473–75 (2005) (discussing U.S. courts’ early rejections of non-utilitarian theories of intellectual property).

131. See Opderbeck, *supra* note 8, at 746 (noting the appeal of measurability in utilitarian theories); Silbey, *Promoting Progress*, *supra* note 7, at 526; see also Obst et al., *supra* note 44, at 88–92 (describing some of the complications in measuring belonging).

132. See, e.g., Fisher, *supra* note 12, at 1463–72 (discussing scholarship on intellectual property and human flourishing).

133. As discussed below, however, creators may create less or less well in the absence of a sense of belonging. See *infra* Part IV.B.1.

extent the law discourages community formation or other belonging-promoting conditions, it may not discourage creation but would still undermine belonging.

Exclusivity grants can, in some circumstances, strengthen senses of belonging and promote the creation of creative communities. In others, they can undermine or even destroy belonging. The same can be said for legal exceptions to exclusivity. In setting legal policy, therefore, it is worth observing that the law may be encouraging, discouraging, or abridging access to a fundamental human need. It is worth considering whether policies that undermine belonging are “worth it” for other reasons. And, as discussed below, it is worth considering that when the law undermines individuals’ sense of belonging, it may disproportionately exclude certain people from creative endeavors.<sup>134</sup>

A few examples demonstrate how exclusivity grants could promote a sense of belonging beyond merely promoting the creation of stuff and how the characteristics of those grants could interact with belonging. The very act of labeling a creator an “owner” of intellectual property may, regardless of the scope of ownership, give that creator a sense of legitimacy, personal acknowledgement, status, competence, authenticity, and recognition that would promote their sense of belonging to a group of “authors,” “inventors,” or other “intellectual property creators.”<sup>135</sup> For this sense to attach, the scope of protection need not necessarily be strong but would best include some sort of attribution or other acknowledgement. The grant of exclusive rights to an author or inventor could promote mutual trust, and thus belonging, by making that author or inventor comfortable with the idea of gathering or collaborating with others, safe in the knowledge that the law prevents those others from “stealing” or otherwise appropriating their work. For that sense to attach, creators would need the ability to obtain protection relatively early in their creative processes to facilitate collaboration without the loss of rights. Finally, exclusivity grants may promote not only the creation of trademarks, but also the creation of communities of belonging around those marks. For this sense to attach, mark-holders would need to have rights against competing mark-creators but not against those user-communities.

Explicit carve-outs and exemptions from intellectual property exclusivity can also promote belonging. Current exemptions permitting educational and religious performance of copyrighted works permit student and commu-

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134. See *infra* Part V.B.

135. See Jessica Silbey, *Patent Variation: Discerning Diversity Among Patent Functions*, 45 LOY. U. CHI. L.J. 441, 456 (2013) (noting that patentees appreciate being part of a “storied legacy of the great inventors” as a result of being named in a patent); SILBEY, EUREKA MYTH, *supra* note 9, at 218–19 (IP protection “promotes personal well-being for those who desire recognition and tribute for their talent and for those who seek to maintain productive and emotionally satisfying relationships with collaborators and audiences”); see also *supra* notes 68–71 and accompanying text (discussing relationship between acknowledgement and belonging).



nity groups to form around those performances.<sup>136</sup> An exemption from the novelty and non-obviousness doctrine in patent law prevents coworkers' endeavors inside the same firm from rendering each other's work unprotectable, which means that people can work together and experience the belonging that comes with collaboration.<sup>137</sup> Fair use doctrines in copyright and trademark law permit fan communities to emerge around the reuse of otherwise protected material.<sup>138</sup>

But exclusive rights can also undermine belonging. First, by setting up external systems of punishment and reward, exclusivity laws can intrude on the values ecosystems of creative communities. Creative communities often develop their own norms regarding copying and attribution that help create a sense of belonging and define community boundaries.<sup>139</sup> By providing conflicting rules and reward systems, law can undermine those norm systems, erode community boundaries, remove opportunities for unity of belief, and create rebels who choose to participate in certain aspects of community without conforming consistently to norms.<sup>140</sup> These renegades, in turn, erode the mutual trust and shared values that are central to maintaining a sense of belonging among members.

Second, exclusive rights may disrupt opportunities for belonging by making certain community-building creative endeavors illegal, infringing, or risky. The Copyright Act has prohibited expression and invention that require decrypting technological protection measures (subject to specialized exemptions).<sup>141</sup> Copyright law prohibits unauthorized translation of copyrighted works into other languages, which, in turn, inhibits the development of multi-lingual creative communities surrounding those works.<sup>142</sup> Unpre-

136. 17 U.S.C. § 110 (2012).

137. *See* 35 U.S.C. §§ 102(b)–(c) (2012).

138. *See* 17 U.S.C. § 107; *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 307–08 (9th Cir. 1992) (describing “nominative” fair use doctrine in trademark law); *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (describing First Amendment-based fair-use type doctrine for expressive uses of trademarks).

139. *See infra* Part IV.B.2.

140. *See* Newman & Newman, *supra* note 26, at 526 (being expected to take on norms or roles to which one does not subscribe or with which one does not feel comfortable can disrupt a sense of belonging); Yochai Benkler, *Law, Policy, and Cooperation*, in *GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION* 299, 328 (2009) (describing effects of “crowding out,” where introducing external governance may be counterproductive to fostering cooperation within a community); Rochelle Dreyfuss, *Fragile Equilibria*, 2007 VA. L. REV. IN BRIEF 2.

141. *See* 17 U.S.C. §§ 1201 (a)–(c) (providing that circumventing technological protection measures on copyrighted material is a violation of copyright, regardless of whether circumvention is done for otherwise non-infringing purposes, in the absence of an express exemption from the Copyright Office).

142. *Id.* § 101 (defining translation as derivative work); *id.* § 106 (giving the owner the exclusive right “to prepare derivative works based upon the copyrighted work”); *see generally* Lea Shaver, *Copyright and Inequality*, 92 WASH. U. L. REV. 117 (2014).

dictable trademark laws promote a “clearance culture” that demands licensing even for expressive uses of trademarks that are unlikely to infringe.<sup>143</sup> These rules can sometimes unify creators around a counterculture of transgressive creation or around efforts to change the law.<sup>144</sup> More often, however, they will drive away creators and consumers who would derive belonging from such activities if they were allowed.

Exclusive rights can act as gatekeepers, excluding creators who lack access to the resources or negotiating power to overcome legal constraints or uncertainties. For example, studies show that music students experience belonging when they build upon and perform popular music works that resonate with them (as opposed to working only with public domain materials).<sup>145</sup> But while educational *performances* of copyrighted music are legally permitted,<sup>146</sup> many educators lack the resources or negotiating power to create the custom arrangements they would need to perform popular music in an educational context.<sup>147</sup> In another example, copyright fair use likely permits fans to form communities around the creation and sharing of follow-on works, but concerns about the costs of resisting legal challenge may discourage fans from joining such communities. Fans may also shy away from joining the

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143. See Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011, 1026, 1037 (2009) (discussing chilling effect on expression of trademark maximalism) [hereinafter Rosenblatt, *Rethinking the Parameters of Trademark Use*]; Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1911–16 (2007) (discussing pernicious impact of “clearance culture” encouraged by trademark maximalism); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 904 (2007) (discussing potential chilling effect on expression of trademark rights accretion).

144. See generally BECKER, *supra* note 56. Extralegal countercultures may exhibit belonging, but that does not necessarily mean they exhibit behavior consistent with other policy bases for intellectual property law. For example, studies show that a sense of belonging helped form and promote the growth of peer-to-peer file sharing communities, which may well have been beneficial for the file-sharers but undermined other intellectual property policies. See Zhiyong Yang et al., *Effect of Peer Influence on Unauthorized Music Downloading and Sharing: The Moderating Role of Self-Constraint*, 68 J. BUS. RES. 516, 517 (2015).

145. Thibeault, *supra* note 66, at 109–10.

146. See 17 U.S.C. § 110(1).

147. In 2015, for example, copyright licensing company Tresona demanded that public high schools pay exorbitant fines for past alleged infringement and forward-looking licensing fees for arranging and performing popular music and explained that certain artists’ music simply wasn’t available for use under any licensing terms. Letters on file with author. (Note, proper citation format is not used here to protect privileged information.) See generally Complaint, *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, No. 2:16-cv-00975-PGR (D. Ariz. Apr. 7, 2016).

community of “professional creators” out of fear that their works would fall outside fair use if they were commercialized.<sup>148</sup>

This gatekeeping function may have a disproportionate impact on women’s formation of creative communities: women and girls, more than men and boys, engage with copyrighted and trademarked materials through follow-on creation.<sup>149</sup> Interfering with underrepresented populations’ ability to make follow-on creations impinges on their ability to create the sense of belonging that is part and parcel of fandom because it prevents them from making creative choices about how to engage with existing works.<sup>150</sup> When the law reduces creators’ freedom of choice about what to create, it undermines participants’ ability to make creative decisions and thus diminishes opportunities for belonging to thrive.

Trademark law may have a particularly dramatic ability to promote or undermine belonging. On one hand, as discussed above, trademarks have tremendous power to build belonging, and brand holders have come to understand and harness that power.<sup>151</sup> On the other hand, trademark law gives mark-holders ownership over the signals of belonging and the right to prevent their use.<sup>152</sup> Even though trademark law has narrow application in expressive contexts, it can chill opportunities for belonging not only by chilling the creation of expressive works,<sup>153</sup> but also by preventing consumers from celebrating the very belonging that brand-owners have striven to create. Mark ownership constrains the creative decisions of the creators who value trademarks’ signaling functions. This chilling effect is evident in fan communities: when Mattel took action against Barbie fans’ use of the Barbie trade name, it splintered fans into those who agreed to Mattel’s terms and a “Pink Tidal Wave”

148. See Fiesler, *supra* note 105, at 23–26; Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 32 (2013) [hereinafter Rosenblatt, *Fear and Loathing*] (explaining the high cost of litigation is “not worth the price” and “can be crushingly expensive and time consuming”).

149. See Fiesler, *supra* note 105, at 11, 33; Kristina Busse, *Introduction*, 48 CINEMA J. 104, 105–06 (2009); Francesca Coppa, *A Fannish Taxonomy of Hotness*, 48 CINEMA J. 107, 107 (2009); Micole, *Women’s Art and “Women’s Work,”* AMBLING ALONG AQUEDUCT (Aug. 29, 2007, 11:15 AM), <http://aqueductpress.blogspot.com/2007/08/womens-art-and-womens-work.html>.

150. See Fiesler, *supra* note 105, at 29, 33. This disproportionate impact is particularly ironic considering that the need for a sense of belonging is particularly important in developing the self-esteem of people who have experienced rejection. Megan L. Knowles & Wendi L. Gardner, *Benefits of Membership: The Activation and Amplification of Group Identities in Response to Social Rejection*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1200, 1204 (2008).

151. See, e.g., Lindsay Kolowich, *Mac or PC? A Brief History of Apple & Microsoft’s Ad War*, HUBSPOT (Jan. 9, 2015, 8:00 AM), <https://blog.hubspot.com/marketing/mac-pc-advertising-history#sm.0000k2i17v1c31erbwaz8dz39t1dd>.

152. 15 U.S.C. § 1127 (2012) (defining trademark law protections).

153. Rosenblatt, *Rethinking the Parameters of Trademark Use*, *supra* note 143, at 1013–14, 1041–42.

of unhappy trademark protesters.<sup>154</sup> In another example, fear of trademark reprisal directly disrupted the formation of community in the City of Heroes multi-player video game by preventing players from creating characters modeled on existing characters.<sup>155</sup>

These are only a few of many possible examples of how intellectual property exclusivity and exceptions can promote or undermine belonging. Each of these rules, naturally, comes with other trade-offs; rules that promote belonging may inhibit other intellectual property policies, and vice versa. But to date, few scholars have considered exclusivity rules' impacts on belonging. The following section explains why, even if one is chiefly concerned with incentivizing the creation of stuff, considerations of belonging still matter.

### *B. Belonging Matters Even in a Stuff-Based World*

Even those who care only about the physical output of intellectual endeavors should still care about belonging, because belonging is synergistic with physical output. As discussed above, the desire for a sense of belonging is a powerful motivator and shaper of behavior. As such, it undoubtedly plays a significant role in individual creators' motivations to create and their decisions to follow or diverge from formal intellectual property law. Or to put it differently: belonging motivates the creation of more and better stuff and promotes stable management regimes for how people use, copy, and attribute stuff within creative communities.

#### 1. Belonging Motivates Individuals to Create More and Better Stuff

Studies consistently show that “intrinsic” motivation – wanting to do something for oneself – is more effective than “extrinsic” motivations such as coercion or payment.<sup>156</sup> For many creators, belonging operates in an independent ecosystem of incentives and rewards that has relatively little to do with exclusivity or pecuniary benefit. For these people, creating is both a condition and a manifestation of belonging, and belonging is a reward for creating. Case studies of low-IP “negative space” communities have documented this phenomenon,<sup>157</sup> including studies of such diverse communities as

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154. See MARY F. ROGERS, *BARBIE CULTURE* 92–93 (1999); Denise Gellene, *Barbie Protesters Aren't Playing Around*, L.A. TIMES (May 10, 1997), [http://articles.latimes.com/1997-05-10/news/mn-57377\\_1\\_barbie-collector](http://articles.latimes.com/1997-05-10/news/mn-57377_1_barbie-collector) (“They are stealing our hobby. We want our hobby back.”).

155. See Fiesler, *supra* note 105, at 27–28.

156. See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 640–46 (2012).

157. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (defining “negative space”); see generally CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (Kate Darling & Aaron Perzanowski eds., 2017) (collecting several case studies of IP “negative spaces”); Elizabeth Rosen-

media fans,<sup>158</sup> graffiti and street artists,<sup>159</sup> performance magicians,<sup>160</sup> professional athletes,<sup>161</sup> hip-hop mixtape makers,<sup>162</sup> jamband performers and fans,<sup>163</sup> academic scientists,<sup>164</sup> drag queens,<sup>165</sup> wiki contributors,<sup>166</sup> and roller

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blatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011) (creating a taxonomy of IP “negative spaces” and describing conditions conducive to their creation and maintenance).

158. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 657 (1997). Tushnet recites:

The ethos of [fan fiction] is one of community, of shared journeys to understanding and enjoyment. Regardless of literary value, fan fiction is a pleasurable and valuable part of many fans’ experiences. The political importance of fandom stems from sharing secondary creations. Fans feel that they are making significant life choices when they share their work with a broader community of like-minded people.

*Id.* (quoting Henry Jenkins, “At Other Times, Like Females”: *Gender and Star Trek Fan Fiction*, in SCIENCE FICTION AUDIENCES: WATCHING DR. WHO AND STAR TREK 196, 203 (1995)); Fiesler, *supra* note 105, at 5–6 (describing how fans identify as part of fandom communities and communicate with other fans by making fanworks such as fanfiction, fanart, and cosplay).

159. See MARTA ILJADICA, *COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE* 9–31 (2016) (describing how street artists create particular styles in order to reinforce subcultural belonging).

160. See Jacob Loshin, *Secrets Revealed: Protecting Magicians’ Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 125–30 (2010) (describing how performance magicians must create and perform tricks in order to belong to magician community and comply with secrecy norms to maintain belonging).

161. See F. Scott Kieff et al., *It’s Your Turn, But It’s My Move: Intellectual Property Protection for Sports “Moves,”* 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 768–81 (2009) (describing how athletes create original moves to be admitted to and maintain membership in elite athletic communities); Magliocca, *supra* note 93, at 877 (discussing community as a value-trumping protection in athletics).

162. Horace E. Anderson, Jr., “Criminal Minded?”: *Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 126–31 (2008) (community built upon creation and sharing of music).

163. 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, 668–91 (2006) (community built upon creation and sharing of music).

164. See Strandburg, *supra* note 92, at 108–09; see generally Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999) (analyzing the evolution of norm changes within the academic scientific community subsequent to commercial involvement); Haeussler, *supra* note 71 (studying information-sharing behavior in the academic and industrial science fields).

165. See Eden Sarid, *Don’t Be a Drag, Just Be a Queen – How Drag Queens Protect Their Intellectual Property Without Law*, 10 FIU L. REV. 133, 147 (2014) (describing participants’ view that “[t]he feeling of belonging to a community (unre-

derby participants.<sup>167</sup> Although these communities have little in common superficially, each requires that members contribute creative products to the community and rewards such contribution with belonging.<sup>168</sup> But this phenomenon is not unique to negative spaces. For example, studies of professional artists describe community as a “value in itself” that drives voluntary or low-paying participation in arts-related activities.<sup>169</sup>

By creating and sharing their creations with other community members, creators make contact with and become visible to other community members and are rewarded with the belonging born of repeated interaction and the opportunity to experience competence and the recognition of community members.<sup>170</sup> With this in mind, it may not be surprising that many give their work away for free, especially to others in the same creative communities. For many, membership in a community is its own reward, and copying (with attribution, according to community norms) both enriches the community and promotes a sense of belonging in a way that exclusivity would not.

In turn, belonging incentivizes the creation of more stuff. Studies show that the more a particular behavior satisfies the need to belong, the more group members will engage in it.<sup>171</sup> Thus, creative activity that promotes connection with a creative community is, in a sense, self-perpetuating: it creates conditions conducive to the development of belonging, such as feelings of recognition and competence, and the resulting sense of belonging motivates participants to continue engaging in it. A desire to belong may not be the initial motivator that inspires people to create in the first place,<sup>172</sup> but the opportunity for a sense of belonging both attracts creators to communities and

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lated to the greater gay community) is a strong motivation for” creation of drag personas and performances).

166. Garon, *supra* note 90, at 105.

167. Fagundes, *supra* note 89, at 1111–13 (describing system in which participants in roller derby were required to create a unique derby name in order to participate).

168. *See supra* notes 158–67 and sources cited therein.

169. MURRAY, PIPER & ROBERTSON, *supra* note 9, at 143; *see* Waitt & Gibson, *supra* note 21, at 78 (identifying the sense of belonging, identity, and empowerment that a gallery provided as a driving force in artists’ participation, with financial concerns taking a backseat).

170. *See* Newman & Newman, *supra* note 26, at 524 (“Group identity emerges out of continuous interactions, through which one becomes visible and known to other group members, and they become visible and known to you.”).

171. Mark Manning, *When We Do What We See: The Moderating Role of Social Motivation on the Relation Between Subjective Norms and Behavior in the Theory of Planned Behavior*, 33 BASIC & APPLIED SOC. PSYCHOL. 351, 357 (2011).

172. *See* SILBEY, EUREKA MYTH, *supra* note 9, at 28 (finding that for many professional creators, the initial impetus to engage in creative endeavors is curiosity, compulsion, or the desire to solve particular problems).

encourages them to stay.<sup>173</sup> Moreover, the transformative impact and appeal of belonging to a creative community make creation possible for people who, as one study found, “may have been reluctant to openly pursue a creative practice,” facilitating production of creative products and, for some, transition from amateur to professional status.<sup>174</sup> This may be particularly true for marginalized people who are able to find their voices through participation in a community of creation.<sup>175</sup> As a result, the opportunity to experience a sense of belonging may bring a greater diversity of approaches and voices to creative endeavors, something that is beneficial to creation and innovation, as well as human flourishing.<sup>176</sup>

In addition, experiencing belonging pushes people to create *more* and *better* tangible products. Studies show that people exert more effort and persist longer at attempting difficult tasks when they experience a sense of belonging.<sup>177</sup> For example, people express a higher level of enthusiasm for challenging puzzles when they have experienced being part of a puzzle-solving group.<sup>178</sup> Experiencing belonging in creative communities provides a sense of ownership and motivation in connection with one’s work, which improves the quality of that work.<sup>179</sup> Moreover, seeing oneself as a competent member of one or more groups is fundamental not only to self-concept, but also to one’s willingness to contribute to society.<sup>180</sup> Thus, attaining a sense of belonging frees creators to focus on competence and excellence<sup>181</sup> and enables people to create in a way that contributes to society. Belonging also promotes information exchange, which, in turn, promotes scientific ad-

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173. See Countryman, *supra* note 18, at 106 (describing how “communities of practice” music programs foster a sense of belonging and attract and retain a broader range of participants than programs that focus primarily on musical output).

174. See Waitt & Gibson, *supra* note 21, at 82.

175. See Org. for Transformative Works, *supra* note 4, at 29–38.

176. See generally ETHAN ZUCKERMAN, *REWIRE: DIGITAL COSMOPOLITANS IN THE AGE OF CONNECTION* (2013) (discussing the benefit of diverse approaches to problem solving to technological and social progress); Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1417–18 (discussing benefits of public domain, including diversification of creative voices).

177. See Sofia Mysirlaki & Fontini Paraskeva, *Massively Multiplayer Online Games as Activity Systems: The Relationship Between Motivation, Performance and Community*, in *PROCEEDINGS OF THE 5TH EUROPEAN CONFERENCE ON GAMES BASED LEARNING* 412, 414 (2011).

178. Walton et al., *supra* note 26, at 524.

179. See Countryman, *supra* note 18, at 103–04 (“[Sense of belonging] ended up resulting in better quality performing because everybody was more motivated, they had more ownership.”).

180. See Newman & Newman, *supra* note 26, at 521.

181. See Levett-Jones & Lathlean, *supra* note 25, at 2874 (“[U]ntil students feel accepted by staff and are assured of a valid place in the team[,] they remain reoccupied with fitting in and their progress is negatively impacted.”).

vancement.<sup>182</sup> Studies show that scientists are more likely to share useful information when they perceive that they belong to a community with open science norms and when they believe the party seeking the information is an academic scientist rather than an industry scientist.<sup>183</sup> These findings suggest that commodifying information may actually inhibit progress rather than promote it.<sup>184</sup> So to the extent progress is defined as solving problems through expression and innovation, there can be little question that fostering a sense of belonging also fosters progress.

Of course, a desire to experience belonging cannot be the *only* reason people create or strive for excellence – just as a desire for fame or fortune cannot be. For one thing, a desire to belong is unlikely to be a significant motivator for firms or collective entities. While individual directors and employees may be motivated by the desire to belong, corporations and other collective entities lack the capacity to care about values such as “belonging.” These entities are more likely to be driven by purely economic motivations. The same is true for creative workers within firms: although some firms foster a sense of belonging collaboration within the organization, which may satisfy individual workers’ need to belong,<sup>185</sup> there is no reason to expect that every firm would do so. And firms’ profit-maximizing tendency toward pursuing exclusivity models for distribution may hamper workers’ and users’ interests in belonging and, hence, their motivation.<sup>186</sup>

Nor can we expect a desire to belong to be a motivating force for every individual creator, even in the same creative community. While the desire to belong is relatively universal,<sup>187</sup> not every person finds belonging in the same way.<sup>188</sup> Creators have many reasons for creating and acquire many different things out of their participation in creative communities. Some may have strictly pecuniary interests; some may be driven by non-monetary incentives

182. See Zhao et al., *supra* note 48, at 584 (demonstrating strong correlation between a sense of belonging and willingness to share knowledge); ZUCKERMAN, *supra* note 176, at 31 (discussing advantages of information exchange for progress).

183. Haeussler, *supra* note 71, at 106, 117 (noting that academic scientists more often hold pro-sharing norms, while industry scientists more often share information only on a reciprocal basis).

184. See Rai, *supra* note 164, at 124; Strandburg, *supra* note 92, at 107–13.

185. See, e.g., SILBEY, EUREKA MYTH, *supra* note 9, at 259.

186. See *id.* at 261 (noting “[t]his suggests that firms, by embracing a[n] exclusivity-based distribution] strategy, may fail to fulfill (or even address)” employee and user interests in building relationships that are “emotionally fulfilling, collaborative, and productive”).

187. See Hammell, *supra* note 31, at 40–41.

188. For example, one in-depth qualitative study of an Australian “Derby Grrrl” creative community contrasted two participants’ self-created narratives about the pursuit, only one of which focused heavily on the community’s ability to provide belonging and identity experiences. See generally Adele Pavlidis & Simone Fullagar, *Narrating the Multiplicity of “Derby Grrrl”*: Exploring Intersectionality and the Dynamics of Affect in Roller Derby, 35 LEISURE SCI. 422 (2013).



like a desire for fame;<sup>189</sup> some may be driven by intrinsic motivators like curiosity or compulsion;<sup>190</sup> but most will be driven by some combination of these things. Furthermore, even the most belonging-focused creator may benefit from economic incentives that make it possible to make a living as a creator. For these reasons, the economic impact of intellectual property laws cannot be ignored. But I do suggest that in analyzing creators' motivations to create, there is little reason to privilege economic benefit above other human values<sup>191</sup> – and the complicated nature of creation and creative incentives makes belonging relevant to discussions about intellectual property law and policy.

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189. See generally JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 189 (2008) (“Assume a random distribution of incentive structures in different people . . . [I]t just does not matter why they do it. In lots of cases, they *will* do it. One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and a fourth because he has to solve a particular problem anyway for his own job and loses nothing by making his hack available for all. Each person has their own reserve price, the point at which they say, ‘Now I will turn off *Survivor* and go and create something.’”); see also SILBEY, *EUREKA MYTH*, *supra* note 9, at 14–15; Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 851, 854 n.29 (2008) (“We need not specify what motivates . . . authors [who share their works for free or for nominal prices] . . . We need only observe that . . . non-monetary incentives sometimes suffice to inspire authorship.”); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1177, 1177 n.25 (2005) (arguing that the desire for fame is a primary incentive for creativity); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 42, 58 (2007) (arguing that copyright law should be reconfigured to support reputation-based incentives as well as monetary incentives).

190. See SILBEY, *EUREKA MYTH*, *supra* note 9, at 28; see also Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) [hereinafter Tushnet, *Economies of Desire*] (describing roles of “love, desire, and other passions” in creation).

191. Indeed, there is little empirical evidence for the premise that economic benefit spurs creativity and good reason to believe that it does not. See Tushnet, *Economies of Desire*, *supra* note 190, at 515 (“Psychological and sociological concepts can do more to explain creative impulses than classical economics. . . . As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.”); Johnson, *supra* note 156, at 624 (“New strains of thinking in the fields of economics, psychology, and business-management studies now debunk the long-venerated idea that legal authority must provide some artificial inducement to artistic and technological progress.”); Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1673–74 (2009) (“[T]here is no uniform or fully predictable statistical relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general. . . . So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.”).

## 2. Belonging Promotes Stable Management Regimes for Using, Copying, and Attributing Stuff Within Creative Communities, but Not Among Them

Belonging not only motivates the creation of stuff, but it also motivates people to create and comply with community norms and values, including copying and attribution norms tailored to the needs of particular creative communities.<sup>192</sup> Groups create their own norms<sup>193</sup> as group members select modes of behavior that bond the group together and serve the community's needs and endeavors.<sup>194</sup> Such norms may stand in direct opposition to or rebellion against formal law or to the perceived or presumed norms of an out-group. A case study of knitters and other fiber artists, for example, found that communities had developed consistent intellectual property norms that were in some ways less copying-tolerant than formal intellectual property law but that also rejected certain kinds of aggressive claims.<sup>195</sup> Although there was little evidence that such overreaching claims actually occurred, the *idea* of them, and the rejection of their validity, persisted among the community, prompting the researcher to wonder whether such claimants “actually exist, or if they are mythical creatures who nonetheless play an essential role in allowing knitters to define their community norms against a threat.”<sup>196</sup>

Compliance with community norms, in turn, reinforces members' sense of belonging. The greater the belief uniformity in a group, the more likely its members will feel belonging,<sup>197</sup> and people who desire a sense of belonging are likely to adopt the values and norms of the community to which they belong.<sup>198</sup> In creative communities, therefore, creators conform to their creative community's protection, enforcement, and copying norms because compliance reinforces their sense of belonging to that community.<sup>199</sup> Indeed, people motivated by a desire to maintain a sense of belonging will follow community norms even when those norms otherwise conflict with their self-interest.<sup>200</sup> Studies show that a desire to experience belonging can be a prime motivator

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192. See Hogg et al., *supra* note 118, at 135 (noting that belonging provides individuals with an “identity and associated consensual belief system that informs us who we are and how we should view and treat others, and how others will view and treat us”); Levett-Jones et al., *supra* note 26, at 215.

193. See Pehrson et al., *supra* note 68, at 250 (“[B]ehaviour actively shapes group norms in a deliberate way rather than merely following them.”).

194. See Newman & Newman, *supra* note 26, at 524.

195. See MURRAY, PIPER & ROBERTSON, *supra* note 9, at 48–50.

196. *Id.* at 50.

197. See, e.g., Stroope, *supra* note 72, at 580.

198. See Steinel et al., *supra* note 38, at 789 (finding that people on the outskirts of a group adhere even more closely to group norms than prototypical group members when they have a high need to belong).

199. See *id.* at 781.

200. See, e.g., Levett-Jones et al., *supra* note 26, at 215–16.

of volunteer behavior, for example,<sup>201</sup> and that people may elect to engage in occupations they do not enjoy “solely to give pleasure to others or for the opportunity to spend time with others in shared occupation.”<sup>202</sup> In communities where the prevailing mode of production is free sharing as opposed to sales, for example, members will share their work even when selling it would be profitable.<sup>203</sup>

Intellectual property-type norms can help define the boundaries of creative communities: “If you follow this norm, you’re one of us; if you’re not, you’re out.” Many fan fiction writers, for example, strongly favor transformative copying, as long as it includes attribution.<sup>204</sup> They not only write transformative works, but also welcome others to remix (and attribute) their fanworks.<sup>205</sup> This norm sets fanwork creators apart from “traditional authors” and commercial pastiche writers, who are more likely to adhere to formal law rather than fandom’s copying norms.

Although norms help define community, they do not necessarily impose or enforce rigid boundaries or exclusive membership. People may belong to multiple communities with different norms systems and can contextualize their norms.<sup>206</sup> For example, well-known professional authors who are also media fans tend to publish their fanworks under pseudonyms – even when publishing under their “real-life” names might garner greater readership for their fanworks.<sup>207</sup> So why use pseudonyms? Because fans appreciate the norms, boundaries, and benefits of participating in media fandom and want to experience them as distinct from their professional communities.<sup>208</sup> Indeed, the existence of norms and expectations in creative communities may actually facilitate mobility among groups. People comply with community norms as a way of building a sense of belonging within that community; as a result, in communities without formal barriers to entry, individuals may be able to gain recognition and acceptance in a particular community by creating the sorts of

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201. See, e.g., Paul Bramston et al., *Assessing Environmental Stewardship Motivation*, 43 ENV’T & BEHAV. 776, 784–85 (2011).

202. See Hammell, *supra* note 31, at 43.

203. See Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 470–71 (2013).

204. See Fiesler, *supra* note 105, at 752–54; Tushnet, *Payment in Credit*, *supra* note 86, at 154–57.

205. See Fiesler, *supra* note 105, at 752–54.

206. See generally MURRAY, PIPER & ROBERTSON, *supra* note 9.

207. See Naomi Novik, *What Ought to Go Without Saying but Doesn’t*, LIVEJOURNAL (Mar. 3, 2006), <http://naominovik.livejournal.com/38371.html> (discussing possible marketing benefit of linking fandom spaces to “real name”).

208. See Francesca Coppa, *My Name Is Francesca Coppa*, BE YOURSELF ONLINE (July 30, 2011), <http://web.archive.org/web/20111016035736/http://my.nameis.me/3/francesca-coppa/> (describing pseudonymous culture among media fans); Org. for Transformative Works, *supra* note 4, at 39–40.

works or inventions that the community values and by following the community's norms.<sup>209</sup>

Belonging, therefore, generates its own regulatory scheme for in-groups, optimized to communities and networks. Shared belief in these norms, in turn, strengthens participants' sense of belonging – which, as discussed above, promotes the creation of stuff. As a result, belonging can generate and maintain relatively stable governance systems for intellectual property within creative communities.

Belonging is poorly suited, however, for governing intellectual property behavior *among* groups. As sociologist Howard Becker explains, “Insofar as the rules of various groups conflict and contradict one another, there will be disagreement about the kind of behavior that is proper in any given situation.”<sup>210</sup> Members of different communities will feel no obligation to comply with each other's norms – in fact, they are most likely to reject each other's norms precisely because they are not their own.<sup>211</sup> For example, drag queens follow their own internally developed community copying and attribution norms, even though their entire endeavor is predicated on copying out-group members (i.e., pop stars), and the queens are more inclined to punish out-group members than in-group members for violating community norms.<sup>212</sup> This is only one of many examples: empirical studies consistently show that people favor in-group members over out-group members and prefer harsher punishments for outsiders who violate community norms than for insiders who violate community norms.<sup>213</sup>

## V. WHAT CAN IP LEARN FROM STUDYING BELONGING?

Belonging, with its complicated relationship to exclusivity, provides a lens through which to view intellectual property law, norms, and behavior, and it complicates intellectual property's incentive narrative. It tells us that regulations aimed at incentivizing the creation of “stuff” will inevitably fail to capture the entire picture of creative production and may regulate away another creative product, namely, belonging. It tells us that reliance on economic incentives to encourage creative activity may overlook the beneficial

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209. See Carol M. Rose, *Surprising Commons*, 2014 BYU L. REV. 1257, 1281 (effective intellectual commons have “porous boundaries and opportunities for movement,” but “some are participants and some are not”; membership “means something,” but the communities are open to outsiders who can join by acting like insiders. To the extent that “acting like an insider” involves creating, the act of creation therefore not only creates an object, but also a sense of belonging in the creator).

210. BECKER, *supra* note 56, at 15.

211. See Schiller et al., *supra* note 54, at 173–74.

212. See Sarid, *supra* note 165, at 149–51.

213. See Schiller et al., *supra* note 54, at 173–74; MURRAY, PIPER & ROBERTSON, *supra* note 9, at 54 (noting distinction between “fiber artist,” “crafter,” and “big businesses,” calling for community's different intellectual property treatment for creations of each).

impacts of belonging-based incentives for creation and may privilege corporate interests and incentives over individuals'. Finally, the study of belonging and the governance structures it engenders may provide insight into when formal law is, and is not, necessary to govern copying and attribution behavior.

### A. *Stuff Isn't Everything*

As the preceding sections demonstrate, stuff is neither the only, nor necessarily the most important, benefit of creative endeavor. Creative activities can help individuals develop a sense of belonging even if they never yield a protectable work of authorship, trademark, or invention. As discussed above, belonging can be encouraged or discouraged even in the context of creative activity. Creative communities can foster belonging even in ways that may contribute only indirectly to stuff-making (for example, commenting on creations or mentoring creators<sup>214</sup>) or in ways that may improve the quality of stuff but slow its production (for example, critiquing, editing, or conducting quality research). Put differently, belonging is more than just a positive externality of stuff-making. It is a separate good that both promotes and is promoted by stuff-making.

Regulations aimed solely at incentivizing the creation of stuff, therefore, take an incomplete view of "progress." Considering the extent to which the production of tangible goods has pervaded discussions of intellectual property law and policy, it may be difficult to shift our thinking to include notions of belonging as among the policy objectives of intellectual property law. But the difficulty of this endeavor makes it no less worthwhile, especially considering that in seeking to maximize or optimize stuff-creation, intellectual property law may inadvertently regulate away a fundamental human need. Such regulations may be "worth it" for other policy reasons, but any such analysis should take belonging into account.

A complete catalog of intellectual property sub-doctrines and their likely impact on belonging-creation is beyond the scope of this Article, but by way of example:

- Rules that encourage collaboration among creators, inventors, and mark-users are likely to promote both the *interaction* and *shared endeavor* elements of belonging.<sup>215</sup> Along similar lines, rules that encourage secrecy may undermine belonging generally but promote it among those who are "in" on the secret.

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214. See Ballinger et al., *supra* note 19, at 24–25 (discussing how participating in activities such as mentoring at a woodworking-focused "men's shed" contributed to older men's senses of belonging and well-being).

215. See, e.g., Countryman, *supra* note 18, at 98–99; Lipe et al., *supra* note 85, at 28.

- Rules that increase barriers to entry for creative endeavors may undermine opportunities for *shared endeavor* and *creative decision-making*. This effect may be particularly notable in areas that serve as entry points for new and developing creators and innovators, such as creating follow-on works based on existing copyrighted or trademarked material<sup>216</sup> or experimenting with existing inventions.<sup>217</sup>
- By its nature, intellectual property exclusivity constrains *creative decision-making*. For example, those who create derivative works and improvement inventions must license their inspirational content or wade into the uncertain waters of copyright fair use law, trademark exceptions, technical anti-circumvention provisions, and blocking patents.<sup>218</sup> These restrictions not only inhibit creators' decision-making opportunities, but may also prove particularly harmful to belonging because, as discussed above, many forms of derivative creation are particularly powerful community builders.<sup>219</sup>
- Rules that facilitate or encourage attribution are likely to promote belonging, while rules that discourage attribution are likely to undermine it. For example, the "work made for hire" doctrine, which permits employers to claim authorship over employees' works of authorship,<sup>220</sup> permits firms to appropriate individuals' potential *recognition* and *immortality* benefits of belonging. On an even larger scale, granting authors a right of attribution might foster those same benefits rather than undermining them, albeit at (perhaps prohibitive) costs to other intellectual property and expressive values.<sup>221</sup>

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216. See Org. for Transformative Works, *supra* note 4, at 2–3.

217. See, e.g., Specialty Equip. Mkt. Ass'n, No. 2014-07, In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies for Proposed Class 21: Reply Comment 6, [https://www.copyright.gov/1201/2015/reply-comments-050115/class%2021/ReplyComments\\_LongForm\\_SEMA\\_Class21.pdf](https://www.copyright.gov/1201/2015/reply-comments-050115/class%2021/ReplyComments_LongForm_SEMA_Class21.pdf) (discussing potential chilling effect of copyright law on consumers' ability to tinker with vehicles); iFixit, Short Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201, [https://www.copyright.gov/1201/2015/comments-020615/InitialComments\\_LongForm\\_iFixit\\_Class11.pdf](https://www.copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_iFixit_Class11.pdf) (describing wide-ranging impact of copyright on ability to experiment with consumer machines).

218. See Betsy Rosenblatt, *DMCA Hearings, LA: Guest Post by Betsy Rosenblatt, REBECCA TUSHNET'S 43(B)LOG* (May 26, 2015), <http://tushnet.blogspot.com/2015/05/dmca-hearings-la-guest-post-by-betsy.html> [hereinafter Rosenblatt, *DMCA Hearings*].

219. See Org. for Transformative Works, *supra* note 4, at 22–23.

220. 17 U.S.C. § 101 (2012) (defining work made for hire); *id.* § 201(b) (granting authorship rights over works made for hire to employers).

221. See Silbey, *Promoting Progress*, *supra* note 7, at 528 (noting mismatch between IP law and attribution in the arts and sciences).

- Finally, the intrusion of formal governance on norms-based systems may undermine participants' experience of *shared values* by imposing norms different from the endogenous norms of the creative community.<sup>222</sup>

I do not mean to suggest that legal changes that would maximize opportunities for belonging would necessarily be beneficial or practical – only that the law has insufficiently considered the potential impact of intellectual property regulation on creators' and consumers' senses of belonging, and to suggest that from the standpoint of “progress” and human flourishing, it is worth adding such considerations into broader discussions of intellectual property policy.

### *B. Money Isn't Everything, Either*

I am far from the first scholar to recognize that the financial-incentives narrative does not always reflect the reality of creation or justify existing law.<sup>223</sup> I suggest that in some cases, current intellectual property doctrine is better explained as facilitating belonging than as providing financial incentives. This is true, for example, of the educational performance exception to copyright exclusivity, the joint research exception to patent novelty, and the non-obviousness requirements discussed above.<sup>224</sup> Likewise, creators and innovators often frame their activities in belonging terms rather than economic ones.<sup>225</sup> Scientists and engineers often characterize their work as a “conversation,” and artists explain that sharing without hope of monetary gain is “simply the way art” gets made.<sup>226</sup> In fact, creators often undertake their work at great personal economic cost, with no promise or even hope of financial remuneration.<sup>227</sup>

This is not to say, of course, that the financial incentive narrative is never true. Financial incentives unquestionably motivate firms, and they can sometimes make it possible for those motivated by passion or compulsion to make a living creating and innovating, when they otherwise might not. Nevertheless, there is little reason to privilege monetary incentives over other incentives, and even for profit-making ventures, belonging-focused ways of incentivizing creation – including not only exclusivity, but also alternative reward structures such as crowdfunding or attribution – are likely better at

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222. See Belvisi, *supra* note 57, at 6.

223. See *supra* notes 190–91 and sources cited therein.

224. See *supra* Part IV.A.

225. See *supra* Part IV.B.1.

226. See SILBEY, EUREKA MYTH, *supra* note 9, at 254–56.

227. See *id.* at 254–55 (discussing “gift” type of distribution). See, e.g., Haeussler, *supra* note 71, at 116 (finding that scientists will share information even at personal cost to themselves).

promoting creation than exclusivity alone.<sup>228</sup> Moreover, belonging-focused incentives may not only encourage creation as effectively as financial ones in some circumstances, but they may encourage different sorts of creation. For example, belonging may incentivize people to create works or inventions that have great social or personal value but whose market value is speculative or small.

Belonging incentives may also encourage individual innovators outside the corporate context. As discussed above, although firms are made of individuals, the only guaranteed unifying drive of firms' creative decisions is profit, and it is unreasonable to expect every firm to adopt policies that promote belonging among employees.<sup>229</sup> In contrast, while the promise of financial gain undoubtedly motivates many people, individual interests can seldom be boiled down to money alone. Thus, privileging financial incentives over emotional ones privileges corporate creation and innovation over its individual counterpart. Although some firms foster a sense of belonging collaboration within the organization, which may satisfy individual workers' need to belong,<sup>230</sup> firms' profit-maximizing tendency pushes them toward exclusivity models for distribution that may hamper workers' and users' motivation and belonging interests.<sup>231</sup> Because firms are less likely to engage in gifting and sharing behaviors than individuals are, firm "ownership over creative and innovative work may not correspond with the ambitions and aspirations of the actors doing the creating and innovating."<sup>232</sup>

Valuing economic incentives while ignoring emotional ones such as belonging undervalues the multi-faceted nature of individual motivation and warps social concepts of who can be a creator by artificially dividing the world into corporate "makers" and individual "consumers."<sup>233</sup> Individuals

228. Invention crowdsourcing site Quirky provides an example of synergy between emotional and financial incentives. Steve Lohr, *The Invention Mob, Brought to You by Quirky*, N.Y. TIMES (Feb. 14, 2015), <http://www.nytimes.com/2015/02/15/technology/quirky-tests-the-crowd-based-creative-process.html>. Inventors who release their inventions through Quirky see some money from their endeavor, but "for most, the main satisfaction is being a part of ideas that make their way into the world as products. And there is recognition: The inventor's name appears on the packaging for each product." *Id.* Emotions work symbiotically with profit-motive: the inventors develop things at least in part because they want to belong to the category of "inventors," and the companies invest because they get innovative products they can sell. *See id.*

229. *See* Stephanie Bair, *Innovation Inc.*, 32 BERKELEY TECH. L.J. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2896259](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896259).

230. *See, e.g.*, SILBEY, EUREKA MYTH, *supra* note 9, at 259.

231. *See id.* at 261 ("This suggests that firms, by embracing a[n exclusivity-based distribution] strategy, may fail to fulfill (or even address)" employee and user interests in building relationships that are "emotionally fulfilling, collaborative, and productive.").

232. *Id.* at 272.

233. For example, copyright law grants rights to automotive companies that encrypt their software, making those companies the gatekeepers to less financially moti-



who do not prioritize financial gain are cast as oddballs or outliers, hobbyists rather than “authentic” creators or innovators,<sup>234</sup> and their contributions are devalued when they may yield tangible, personal, and social benefits.

Why consider belonging, as opposed to some other value? I do not suggest that belonging is the only non-financial aspect of creation that intellectual property law should consider; other scholars have identified other emotional incentives for creation, such as compulsion, passion, and problem solving,<sup>235</sup> and other difficult-to-measure aspects of human flourishing that IP law may want to promote,<sup>236</sup> and those efforts are important. But there is ample reason to consider belonging in particular. Not only is belonging a fundamental human need that facilitates identity formation and self-expression, but it is also inextricably connected with notions of exclusivity,<sup>237</sup> which lie at the heart of intellectual property law and policy.<sup>238</sup> Moreover, whereas financial incentives are merely instrumental, belonging is *both* a motivator of creation and a creative good in and of itself.<sup>239</sup> Belonging provides an emotional benefit to creators and consumers alike and may also encourage the creation of more and better goods, as discussed above. Therefore, if IP law promotes belonging, it incentivizes not only the creation of belonging, but also the creation of “stuff,” and when IP law undermines belonging, it may also undermine tangible production.

### C. *Belonging Suggests When IP Law Is and Is Not Necessary*

As discussed above, the desire to belong has the capacity to create stable rights-management regimes within groups of belonging.<sup>240</sup> These communities will organically choose the norms that work best for their own creative needs, and the desire to belong and associated community self-regulation mechanisms will likely govern protection, enforcement, and copying within particular creative communities, at least as well as formal law will.<sup>241</sup> From this, we may infer that formal intellectual property law may not be necessary

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vated work such as innovative modification or safety research. See Rosenblatt, *DMCA Hearings*, *supra* note 218.

234. See generally Rosenblatt, *Fear and Loathing*, *supra* note 148, at 34 (“[S]hame is no less powerful in defining people’s personal values in the intellectual property context,” and it has “enormous power to inflict emotional pain on behavioral outliers.”).

235. See *supra* notes 190–91 and accompanying text.

236. See Fisher, *supra* note 12, at 1463–72.

237. See *supra* Part II.A.

238. See *supra* Part III.

239. See Mysirlaki & Paraskeva, *supra* note 177, at 413–14 (motivational power of belonging); Walton et al., *supra* note 26, at 513 (noting examples of belonging’s positive impact on people, including increased IQ and longer life).

240. See *supra* Part IV.B.2.

241. See generally Rosenblatt, *Fear and Loathing*, *supra* note 148 (explaining power of shame and shaming to govern community behavior).

for regulating within such groups. In fact, because external regulation can disrupt cohesion and shared values and undermine belonging, the intrusion of formal law into groups of belonging may detract from the desire to create and from communities' ability to optimize rules to their own needs.<sup>242</sup> This echoes the principle articulated by legal sociologist Donald Black, that the closer the relationship between participants, the less need for external (i.e., legal) intervention in their relationship.<sup>243</sup> There may be times when regulating a community's intragroup norms may be beneficial for society – such as when the norms rely on physical violence to enforce copying and attribution rules<sup>244</sup> – but regulators should be aware that such regulation may come at a price to belonging.

In contrast, as discussed above, the need for legal regulation of interaction among groups may be all the greater because of the influence of belonging.<sup>245</sup> These findings imply that while it may be both efficient and socially beneficial for groups to create their own intragroup norms and conduct their own intragroup enforcement, *intergroup* rule creation and enforcement are most likely to be fair and objective if done by third parties, such as legislatures and courts. Extra-legal norms may not be sufficient to govern situations in which multiple communities believe that they have, or should have, “rights” in a particular type of intellectual creation, as can happen when the consumer/creator line blurs.<sup>246</sup> In practice, fair use law demonstrates the feasibility and benefit of this policy differential as applied to fan communities' internal and external interactions: fan communities regulate themselves with internal norms against copying other fans' works without attribution, despite copyright law's indifference to attribution, but the fair use provisions of the Copyright Act provide parameters under which fans can make transformative use of commercial authors' (non-fan)works.<sup>247</sup>

Another key lesson from considering belonging in the context of creation is that balancing considerations in setting intercommunity rules does not necessarily mean pitting one group's financial interest against another's. Sometimes it means pitting one group's financial interest against another group's members' personal interests in belonging. And this balance is an

242. See Benkler, *supra* note 140, at 328.

243. Donald Black, *The Epistemology of Pure Sociology*, 20 L. & SOC. INQUIRY 829, 832 n.15 (1995).

244. See, e.g., Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1791 (2008) (noting physical violence as one punishment for violating rights norms in the stand-up comedy community).

245. See *supra* Part IV.B.2.

246. See Dominic D.P. Johnson & Monica Duffy Toft, *Grounds for War: The Evolution of Territorial Conflict*, 38 INT'L SECURITY 7, 32 (2013–2014) (“Where both sides perceive themselves to be the territory resident, [fighting is especially intense] because each side may expect to win and expect the other side to back down, somewhat regardless of size and strength.”).

247. See 17 U.S.C. §§ 101, 107 (2012).

unconsidered but crucial policy value: as important as formal law may be for mediating intergroup behavior, the law should take into account not only the economic needs, but also the belonging needs of those it regulates. When law weakens or undermines the intragroup norms of creative communities, it undermines belonging.

## VI. CONCLUSION

Belonging is not a central intellectual property concept. Perhaps that is sensible: intellectual property laws exist to promote progress and facilitate commerce, and belonging and “progress” are far from the same things. But as the above discussion demonstrates, belonging has much in common with other creative outputs – it is a result of creative endeavor that can improve the state of human flourishing. In that context, belonging may reflect “progress” more fully than the “stuff” of creation, because belonging directly improves human flourishing, while stuff is merely instrumental. Some might argue that while a sense of belonging is a fundamental human need, systems that promote belonging can, in some instances, inhibit progress by reinforcing social strata and discouraging the creative development that accompanies innovative cross-pollination.<sup>248</sup> But in that sense, belonging is no different from other intellectual products, which may be socially beneficial or harmful.

Belonging has the qualities of both a product of creative endeavor and an incentive to engage in further creative endeavor. And as demonstrated above, belonging is far more intertwined with creative activity, intellectual property law, and the physical production of intellectual goods than one might initially expect. We would do well to consider belonging in the context of intellectual property policy – to recognize its power and importance to creators and innovators; to acknowledge its ability to motivate the creation of other goods; to respect its ability to regulate communities, and to consider: what would it look like to build an intellectual property system that considered belonging to be a “creation”?

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248. See generally ZUCKERMAN, *supra* note 176 (discussing innovative benefits of social cross-pollination).