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In *The Eureka Myth*, Jessica Silbey, Professor of Law at Suffolk University, valiantly sets out to debunk the “myth” fostered by the traditional narrative that society would be at a disadvantage were existing intellectual property (IP) regimes dismantled, and creators and innovators no longer granted IP rights which allow them exclusive control over how their works and inventions are used. According to this “myth”, such creators and innovators would lose the incentives to invest their time and effort to create works and inventions of value. The author uses interviews which she has conducted with creators and innovators to show what occurs in practice, in order to disprove the “myth”. Her book is an important supplement to the usual theoretical accounts of IP rights.

Chapter 1 of the book, brimming with inspiration, details the beginnings of creativity—how the creators and innovators interviewed started out in their creative careers, and why. Chapter 2 explores what sustains their initial motivations, when monetary rewards are not forthcoming. This is an acknowledged reality for many creators and innovators toughing it out to make a living for themselves. Chapter 3 describes how sustainable businesses are formed from creative and innovative undertakings, although the interviewees frequently misconceive or fail to consider their IP rights. Chapter 4 explains why building credible reputations are important to the professional well-being of creators, innovators and their businesses. Chapter 5 explores the role of lawyers in the creative and innovative processes, and highlights that lawyers are not always perceived as welcome interveners in those processes. Chapter 6 delineates the myriad ways in which creative works and innovations are distributed. It explains how the IP regime’s focus on exclusive rights frustrates the nobler motivations of creators and innovators and results in the misalignment of the IP regime with current realities.

By the adept weaving of a counter-narrative enriched with the perspectives of over 50 people from IP related industries whom she has interviewed, the author
reaches beyond the conventional monolithic account of IP rights, to lend a personal voice to the creators and innovators whom the IP system claims to protect. Drawing from the accounts of the interviewees who were asked what motivates, and hinders, them in their creative work, the author notes that nobler motivations are prioritised over the grant of exclusive control and the recoupment of financial investment from creative works and innovations. Such motivations include the possibilities of developing appreciative audiences for their works; the opportunities to collaborate with others to produce works of better quality; the building of reputations and the maintenance of autonomy.

Through the interviews conducted, the author reifies the values of creators and innovators that are gradually but surely being atrophied by the priorities of the commercial entities claiming to represent their interests. In doing so, she tries to revive the debate around reforming the existing IP regime, which has stagnated around the simplistic but misleading—and yet increasingly unquestioned—assumption about the necessity of IP rights (i.e. the “myth”). Throughout the book the author makes liberal use of the interview material, a group comprised of IP attorneys, agents, other business facilitators, and creators and innovators (including artists and scientists). A qualitative empirical method is adopted for this purpose, so that the qualitative research data extracted complement and enrich existing quantitative research data (at p.287). The fact that there have been few qualitative studies of the experiences of creators and innovators, in contrast to the growing body of quantitative empirical work in IP scholarship, makes the book all the more valuable. A study like the author’s that generates narratives as to how people relate the IP system to their creative and inventive work is unique. The links between creative and innovative practices to the lofty goals claimed by the IP system (for instance, to promote the progress of science and arts, as per the US constitution) can be more clearly interrogated with reference to the experiences of the interviewees described on their own terms, than through abstract theories of property rights and organisational (as well as individual) behaviours.

The author has excavated the inspired beginnings of artistic and scientific creations from her interviews, to demonstrate how multifaceted narrative explanations can be. In depicting these stories of origin (of creativity and innovation), she effectively engages her readers in the interviewees’ accounts of the “unconsciousness, magic and fortuity” (at p.33) that result in creative works and innovations. Creation and innovation, the author suggests, are responses to external signals in serendipitous circumstances which creators and innovators are moved to harvest in some way (at p.35). These depictions of creative beginnings, being of “circumstantial and biographical complexity”, necessarily weaken the heavy attribution of the motivations of creators and innovators to the grant of exclusive IP rights and the financial remuneration that often follows.

The evidence gleaned from the author’s interviews buttresses her critique of the “Eureka Myth” and further supports her observations: that IP-rich businesses have diversified revenue streams and do not rely strongly on exclusive IP rights for their survival; that under-utilisation of the IP regime will not be addressed by strengthening it as many individuals and businesses intentionally under-enforce their IP rights to maximise the satisfaction of other values and revenue streams;
and, last but not least, that many creators and innovators—whose rights the IP regime claims to champion—have little understanding of how IP rights work, and instead blindly rely on legal and business agents (at p.96). IP rights are shown to play a diminished role in the professional goals of the artists, scientists and their businesses, contrary to the direction which legislative debate and case law have taken. The author concludes that in the event of a continuing misalignment between practice norms and legal rules, and ongoing failure of IP rules to reflect the existing expectations of its subjects, hostility towards the IP regime may increase and the rule of law could be undermined. Her book supports a re-think of the structure and purpose of IP law (at p.284).

Using the stories of origin as a main thread running across her book, the author is successful in showcasing the multiple facets of the creative and innovative processes that are frequently obscured by the one-dimensional economic justifications usually given for the IP system. The flipside of this is that while the author has managed, through her collection of anecdotal evidence, to amass many ideas in the book that can excite its audience, some of these statements remain underdeveloped. One example is a quotation from an IP lawyer interviewed, which indicates how the changing nature of creativity, facilitated by the possibilities proffered by technology, result in frequent conflicts about ownership (at p.48). Another example relates to the author’s suggestion that “we may need to replace the role of gatekeepers with those who originate (rather than sustain) the work” (at p.272), which could do with further substantiation. More elaborate consideration could also be given of the fact that the misalignment between the professional values of creators and innovators, and IP rights, provides flexibility in the regime, with only minimal inconvenience caused to the less savvy right holders who have resort to their normative understandings of the legal rules (at pp.101–102). The book raises many further questions that are addressed only peripherally, including technology’s role in the changing nature of creativity and the substitution of gatekeepers; and the re-calibration of the IP regime so that it can regulate more effectively the creative and innovative behaviours it is intended to optimise. These questions will inspire further research projects. This plausibly extends beyond the author’s intention of the narrower scope for her book—to depict the experiences of the interviewees in order to demolish the orthodox (economic) justification for the IP regime. In this respect, the author acknowledges that the book is more about legal stories than about legal reforms, and how law structures the relationships and serves the personal and professional goals of creators and innovators, and their partners. She manages to show what the interviewees “know that they know”, but there is arguably room for a project inspired by this book to investigate the blind-spots, or what they “do not know that they do not know”.

This book does not assume that creators and innovators—the intended beneficiaries of the IP regime—hold the values which society typically ascribes to them. Instead, through the author’s interviews, their actual motives and behaviours are uncovered. The personal experiences described throughout the book are those to which creators, innovators, and anyone dealing with everyday IP can relate. The empirical research will not only benefit scholars and practitioners of IP law, but also appeal, as the title of the book suggests, to a broader audience interested in the creative process and the IP system’s relevance to it. The “storied”
approach that the book takes could also provide factual groundwork for more evidence-based IP lawmaking, in order to improve the alignment of IP law and existing practices. If supplemented by further research that develops the ideas suggested but only marginally explored in this book, there is hope that a more holistic account of creativity and innovation can shape the IP regime into one of greater relevance to its subjects.

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