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WHAT IS IP FOR? EXPERIMENTS IN LAY AND EXPERT PERCEPTIONS

GREGORY N. MANDEL[†]

INTRODUCTION

The normative justifications for intellectual property (“IP”) law are richly debated. Some policymakers and experts argue that intellectual property should serve utilitarian goals, while others contend that the law should seek to protect natural rights or expressive ends. Such debates have historically lacked data concerning how human actors in the IP system actually conceive of the law. This Essay examines the results of experiments on the understanding of IP law for two critical components of the IP system: the public at large and IP attorneys. The results raise significant concerns about the legitimacy and function of IP law under any of its traditional justifications.

Regardless of IP law’s policy objectives, how people understand the law is crucial to the success of the IP system. This is true both for creators who obtain IP rights and IP consumers who may be regulated by those rights. From the consumer perspective, the ease of copying enabled by modern technological advances means that voluntary compliance is necessary in order for IP law to significantly achieve its goals, whether IP law serves consequentialist or deontist ends. This practical reality may be clearest under a utilitarian approach: any resources that IP owners have to expend to enforce their rights will reduce their ex ante incentives to engage in creation, dissemination, and commercialization in the first instance. Voluntary user compliance is also critical for natural rights and

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expressive conceptions. Widespread copying will chip away at owners' natural rights and will limit the ability of authors and inventors to express themselves.

In addition to these consumer-oriented effects on the IP system, probing people's understanding of IP law also yields valuable information concerning creators. Again, this insight is clear for an incentive model: IP law can only incentivize desired behavior if people know the law or are operating in an environment where incentives are shaped by the law. Similarly, if IP law is meant to better enable individuals to express their personalities and viewpoints, these objectives can only be fully achieved if individuals have some understanding of the law and its potential protection. Finally, creators can only enforce their natural rights if they are aware of them. The relationship between creators' understanding and the success of IP law varies by industry and context, but is an important piece of the puzzle under any of the IP models.

The results of the experiments discussed here raise critical questions for the nexus between IP law's means and ends. The studies of popular perceptions of IP law reveal that the most prevalent perception does not align with any of the commonly accepted bases. Rather, the modal response is that IP law exists to prevent plagiarism. The study of IP attorneys displays much greater alignment with an incentivist approach to IP rights. That being said, even here there is still variation in this conception and in how IP conceptions align with opinions on the strength of protection.

The varying conceptions of IP law exposed in these studies presents challenges both for the ability of the law to function as desired and for the legitimacy of the IP system. The disconnect between attorneys who help operate the IP system and lay IP creators and users who act within it presents fundamental challenges under each of the traditionally conceived bases.

This Essay develops in three parts. Part I explores the incentives, natural rights, and expressive bases for IP law as well as the implications of these bases for creators and users of IP works. Part II reports the results of several studies on IP perceptions among lay individuals and IP attorneys. Part III discusses the implications of the results for the functioning and the perceived legitimacy of the IP system.

I. THE NEXUS BETWEEN INTELLECTUAL PROPERTY'S MEANS AND ENDS

A. *Theories of Intellectual Property Law*

How people understand IP law is crucial to the law's success under any of IP law's traditionally conceived normative bases.¹ The IP Clause of the United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts" by enacting copyright and patent laws.² Consistent with this consequentialist framework, the dominant view of IP law and policy in the United States, particularly in the copyright and patent context,³ has generally been that the law exists in order to incentivize creative activity.⁴ This utilitarian incentive perspective has been repeatedly affirmed by the United States Supreme Court,⁵ and by experts in both legal and economic

¹ Gregory N. Mandel et al., *Intellectual Property Law's Plagiarism Fallacy*, 2015 B.Y.U. L. REV. 915, 917–19 (2015); Portions of Section I.A are drawn from this previous work.

² U.S. CONST. art. I, § 8, cl. 8.

³ This analysis focuses on copyright and patent law because the studies discussed below are primarily directed to copyright and patent law issues. The (limited) trademark results are also discussed. Like copyright and patent law, trademark law is primarily supported based on consequentialist rationales, here to reduce consumer search costs and potential confusion, and, related, to incentivize producers to invest in the quality and distinction of their products and services. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 765–66 (6th ed. 2012); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1858–59, 1863 (2007).

⁴ See Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1328 (2015) ("The traditional justification for intellectual property (IP) rights has been utilitarian."); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746–51 (2012) ("According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with . . . incentive[s] to create artistic, scientific, and technological works . . ."); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597–99 (2003) ("[C]ourts and commentators widely agree that the basic purpose of patent law is utilitarian: We grant patents in order to encourage invention.").

⁵ *E.g.*, *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014) ("We have 'repeatedly emphasized this . . . concern that patent law not inhibit further discovery by improperly tying up the future use of these building blocks of human ingenuity.'" (alteration in original) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1301 (2012))); *Mayo*, 132 S. Ct. at 1305 ("[T]he promise of exclusive rights provides monetary incentives that lead to creation, invention, and discovery."); *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (Stevens, J., dissenting) ("[T]he grant of exclusive rights [in the IP clause] is intended to encourage the

fields.⁶ The rationale for the incentive theory of IP law is that providing authors and inventors with the potential for IP rights will induce them to engage in greater innovative activity than they otherwise would, from the creation to the production to the commercialization of intellectual works.⁷

The incentive theory of IP law is fundamentally behavioral. It is based on the premise that the existence of potential IP rights will cause human beings to change their actions.⁸ Under this perspective, the law can only achieve its desired ends either if people know the law *ex ante* or if they operate in a system designed by others who know the law, such as employees in a research laboratory. Understanding how people comprehend IP law is therefore a critical component for studying the efficacy and efficiency of the law in an incentive framework.⁹

Though the prevailing conceptual basis for IP law is a consequentialist incentive theory, other theories of IP rights also receive support. For example, a number of scholars rely on John

creativity of 'Authors and Inventors.');

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'") (alteration in original) (quoting U.S. CONST. art. 1, § 8, cl. 8)); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[C]opyright supplies the economic incentive to create and disseminate ideas."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (granting patents and copyrights "is intended to motivate the creative activity of authors and inventors"); 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 . . ." (internal quotation mark omitted) (quoting Fox Film Corps. v. Doyal, 286 U.S. 123, 127 (1932))).

⁶ *E.g.*, Fromer, *supra* note 4, at 1750–51 ("The Supreme Court, Congress, and many legal scholars consider utilitarianism the dominant purpose of American copyright and patent law." (footnote omitted)); Burk & Lemley, *supra* note 4, at 1597 ("While there have been a few theories of patent law based in moral right, reward, or distributive justice, they are hard to take seriously as explanations for the actual scope of patent law." (footnote omitted)); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) ("Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.").

⁷ MERGES ET AL., *supra* note 3, at 11–17; Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 926–27 (2010).

⁸ See Mandel et al., *supra* note 1, at 917–18.

⁹ See Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2000 (2011) (discussing how intellectual property law can influence creativity).

Locke's labor theory of property rights and similar concepts to argue that authors and inventors should hold natural rights in their creative works.¹⁰ This deontological perspective views individuals as automatically entitled to the fruits of their labor.¹¹ Natural rights theory reasons that a creator is morally entitled to control the copying and distribution of inventions or artistic creations produced as a result of the creator's own labor and effort.¹²

Other scholars contend, often based on reasoning from Kant and Hegel, that IP rights can advance expressive ends.¹³ Under this rationale, IP rights should be protected to promote greater personal freedom, human flourishing, and cultural

¹⁰ See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 33–41 (2011); RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 3 (2009); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); see generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–330 (1988) (discussing Locke's labor theory as it relates to IP rights). Some scholarship not only supports the natural rights theory of IP, but also makes a historical argument that this was an originally understood basis for such rights in the United States. PAUL D. CLEMENT ET AL., THE CONSTITUTIONAL AND HISTORICAL FOUNDATIONS OF COPYRIGHT PROTECTION 1 (2012) (“[F]rom its inception[,] copyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals’ inherent property right in the fruits of their own labor.”); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1257 (2001) (“It is my intention, nonetheless, to offer a modest challenge to the prevailing view that the ideas of the natural rights philosophers did not influence the early development of patent law.”).

¹¹ MERGES, *supra* note 10, at 33–41.

¹² See Gordon, *supra* note 10, at 1543 (“[A]ll persons have a duty not to interfere with the resources others have appropriated or produced by laboring on the common. This duty is conditional, and is a keystone in the moral justification for property rights.” (footnote omitted)); Hughes, *supra* note 10, at 297 (“Locke proposes that . . . there are enough unclaimed goods so that everyone can appropriate the objects of his labors without infringing upon goods that have been appropriated by someone else.”).

¹³ See, e.g., Fromer, *supra* note 4, at 1754–56; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1894–95 (1987); Hughes, *supra* note 10, at 330–65.

development.¹⁴ Just as individuals use physical property, such as homes or clothing, to express their personality,¹⁵ an individual's intellectual creations may be used in a similar manner.¹⁶

Expressive theories of IP law, like the incentive theory, can only succeed if people are knowledgeable of their rights or potential rights. The human flourishing and personal freedom that IP rights in one's creations may provide can only be promoted if people are aware of such rights. If creators are ignorant of their IP rights, there is little that law can do to advance or protect their expression.

For natural rights conceptions, the link between the ends sought and knowledge of IP rights is weaker. Creators do not need to know about potential rights *ex ante* in order for those rights to vest in creations of the mind *ex post*. Even here, however, knowledge of rights is necessary to achieve protection. In order to fully defend natural rights, people must know that they exist. Furthermore, as discussed in more detail in the following section, how IP users understand the law and operate within the system will significantly affect the scope of creators' natural rights.

B. *Lay and Expert Populations*

The studies examined here involve two different populations: lay individuals and IP attorneys. Understanding lay perceptions of IP rights sheds light on the functioning of the IP system from several perspectives. Lay perspectives will most directly represent the view of many IP users, as well as the perspective of

¹⁴ See, e.g., Fromer, *supra* note 4, at 1754–56; Radin, *supra* note 13, at 1892; Hughes, *supra* note 10, at 330–65.

¹⁵ See Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 119–20 (2012).

¹⁶ See Fromer, *supra* note 4, at 1765–81 (discussing how authors and inventors use their creations to express themselves). Consistent with these alternative notions of IP rights, several European countries endow authors with certain “moral rights” in their works. See Jane C. Ginsburg, “*European Copyright Code*” – *Back to First Principles (With Some Additional Detail)*, 58 J. COPYRIGHT SOC'Y U.S.A. 265, 278–80 (2010); ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 37–47 (2010). These moral rights can include a right of attribution—requiring that the author of a work be identified—and a right of integrity—permitting the author of a work to prevent others from distorting the work in a way that would injure the author's reputation. Ginsburg, *supra*, at 278–80.

certain creators, jurors, some judges, and various policymakers. Each of these categories of actors within the IP system is discussed in turn.¹⁷

Public perceptions of IP rights represent the state of mind for many IP consumers. The ease of copying enabled by modern technological advances, combined with the high transaction costs of enforcement, makes widespread voluntary compliance necessary for the IP system to function as desired under any of its potential bases.¹⁸ Common understanding of IP rights are critical to IP rights compliance and enforcement in any field that is characterized by heavy lay use and the inability of owners to unilaterally control copying behavior.

Lay perceptions also characterize the perspective of a number of potential IP creators. From an incentive perspective, and to some extent an expressive one, these perceptions help shape this population's decisions concerning what activities to engage in. Although many potential IP producers will have more sophisticated knowledge of IP law than the average member of the public, a substantial pool of creators operate on the basis of general background knowledge. This pool includes many individual creators, who generally do not have sophisticated knowledge of IP law, but still make substantial contributions to valuable copyright and patent activity.¹⁹ This pool also includes numerous creators and decision makers at smaller companies, such as start-up entities and small firms, where individuals often lack significant expertise in IP law.²⁰ Creative activity within

¹⁷ Portions of the following discussion are drawn from Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261 (2014).

¹⁸ See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 224 (1997) (suggesting, based on experimental research, that gaining voluntary cooperation with the law will increase the effectiveness of IP law).

¹⁹ See John R. Allison et al., *Valuable Patents*, 92 GEO. L.J. 435, 465–66 (2004) (reporting that a sample of 1,300 U.S. patents included 482 individual inventors and small entity owners); Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1711–12 (2009) (discussing a potential increase in size of the “creative class,” made up of individual artists and authors).

²⁰ See Mark D. Janis & Timothy R. Holbrook, *Patent Law's Audience*, 97 MINN. L. REV. 72, 84 (2012) (rejecting the notion that those who operate under the patent system are all sophisticated concerning the content of patent law).

these firms is critical to the innovation landscape as research indicates that smaller firms are responsible for more significant innovation than larger firms.²¹

The public perception of IP law also reflects the mindset of most jurors deciding IP cases. For example, in the initial U.S. trial in the ongoing *Apple Inc. v. Samsung Electronics Co., Ltd.* litigation,²² it appears that the jury foreman, who is widely recognized to have played a lead role in the jury deliberation, did not accurately understand patent law, even after the judge's instruction.²³ Popular perceptions may also represent the understanding of some district court judges. Many district court judges lack expertise in IP law and hear such cases infrequently.²⁴ For some judges, these issues may be matters of first impression, and as a result, a more lay understanding of IP law may play some role in their initial perspective. That being said, there are certainly other judges, such as those in the Patent Pilot Program,²⁵ who have far greater knowledge of IP law.

Finally, the public perception of IP is likely to influence and guide many lawmakers in determining their support for or opposition to particular IP law proposals. This is true both on an individual preference level—that is, it is the perception that many legislators are expected to possess as individuals—as well as on a representative level because legislators are affected by the opinions and public discourse surrounding IP debates

²¹ MERGES, *supra* note 10, at 210–12; Josh Lerner, *The New Financial Thing: The Origins of Financial Innovations*, 79 J. FIN. ECON. 223, 224 (2006).

²² 909 F. Supp. 2d 1147 (N.D. Cal. 2012), *aff'd in part, vacated in part*, 735 F.3d 1352 (Fed. Cir. 2013).

²³ Mike Masnick, *Samsung/Apple Jury Foreman's Explanation for Verdict Shows He Doesn't Understand Prior Art*, TECHDIRT (Aug. 30, 2012, 11:32 AM), <http://www.techdirt.com/articles/20120830/02063020214/samsungapple-jury-foremans-explanation-verdict-shows-he-doesnt-understand-prior-art.shtml>. For additional discussion of challenges facing jurors in deciding issues in patent cases, see Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1411–14, 1439–44 (2006).

²⁴ See THE STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIR.: JUDICIAL BUS. OF THE U. S. COURTS 128–30 (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> (reporting that approximately two percent of district court caseloads involve copyright and patent cases).

²⁵ Pub. L. No. 111–349, § 1, 124 Stat. 3674 (2011); see generally Judge Randall R. Rader, *Addressing the Elephant: The Potential Effects of the Patent Cases Pilot Program and Leahy-Smith America Invents Act*, 62 AM. U. L. REV. 1105 (2013).

produced by the voting public, media, and general citizenry. These final effects bring this discussion full circle, as they indicate that public preferences for IP law will guide even sophisticated firms' decision making to some extent. Such firms will recognize that they operate in an environment where legal decision making, public policy, and their consumers are all influenced by the public perception of IP rights.

The nexus between IP attorney perceptions of IP rights and the functioning of the IP system is more straight forward. Private attorneys advise their clients about how to operate under the law. These attorneys' understanding of the law influences the counsel that they provide to their clients. In-house IP attorneys at firms within creative and innovative industries may play an even more significant role. These attorneys' beliefs about IP law help shape their firms' decisions concerning what creative activity to engage in and how to protect it under the law. Therefore, knowing how people understand IP law is necessary to elucidate how both creators and consumers are expected to operate under the law.

II. WHAT PEOPLE THINK INTELLECTUAL PROPERTY LAW IS FOR

A. *Lay Individuals: The Plagiarism Fallacy*

To investigate lay perceptions of IP law, Kristina Olson, Anne Fast, and I conducted a preliminary study exploring popular opinions on copying creative work product.²⁶ Using Amazon's Mechanical Turk website, we recruited adult participants located in the United States to take part in the study. Participants were asked an open-ended question: "In general, do you think copying someone else's creative product is acceptable or not? Why or why not?"²⁷ No reference was made to IP protection or IP law.

In their responses to whether copying someone else's creative product is acceptable, seventy-eight percent of respondents identified a moral or ethical basis. Only six percent of the respondents mentioned any legal basis. The explanations provided often focused on the concept of copying another's work

²⁶ Portions of Section II.A are drawn from Mandel et al., *supra* note 1.

²⁷ *Id.* at 923.

as theft, but not from the perspective usually associated with IP rights. Rather, copying was viewed as theft because it was perceived as taking credit for another person's work. Typical responses in this regard included, " 'Copying someone else's work and taking credit for it is theft' and 'I do not think it is right. People should give credit where credit is due.' ”²⁸

This study found that in an abstract context, participants tended to have a strong, negative reaction to copying another person's work. This reaction was rooted in moral and ethical disapproval of copying, not legal concerns. The moral and ethical disapproval appeared closely tied to concerns about one person unduly taking credit for another person's work.²⁹

A follow-up study focused on the public's perception of the basis for IP rights. Based on the traditionally identified justifications for IP rights and the results of the first study, we developed brief descriptions of four potential purposes for IP law: incentives, natural rights, expressive rights, and protection against plagiarism. Participants were presented with these descriptions—in a random order—and were informed that they were “reasons why someone might support laws regulating the products of creativity and innovation.”³⁰ Participants, recruited through Amazon's Mechanical Turk website, were asked to “rank the statements based on how much you agree with them as a basis for intellectual property law.”³¹

The results indicate that participants ranked plagiarism concerns as the leading basis for IP rights more often than any of the other commonly accepted bases ($\chi^2(3) = 15.655, p = 0.001$).³²

²⁸ *Id.*

²⁹ *Id.* at 924.

³⁰ *Id.* at 929.

³¹ *Id.*

³² *Id.* at 931; *see infra* Table 1.

Table 1. Lay individual perceived basis for IP rights.

Top Basis	<i>N</i>	Percent
Plagiarism	43	37.1
Incentives	30	25.9
Natural Rights	30	25.9
Expressive	13	11.2

This pair of studies lend significant support to what we dubbed the “plagiarism fallacy”: That the popular perception of IP rights is that they are designed to prevent plagiarism, not to provide incentives or to protect creators’ natural or expressive rights. As discussed in Part III, the plagiarism fallacy in lay perception has significant implications for IP law and policy.

B. Intellectual Property Law Attorneys

Lisa Larrimore Ouellette, Maggie Wittlin, and I are conducting a separate series of experiments on IP law attorneys’ attitudes towards IP rights and what motivates such attorneys to have particular positions about IP rights. The participant pool was generated from practicing IP attorneys listed on Martindale,³³ or on the websites of the top IP law firms as determined by Vault³⁴ or U.S. News & World Reports.³⁵ One hundred thirty IP attorneys throughout the United States took part in this study.

One question in the study queried the attorneys’ perceived basis for IP rights. Answer options included descriptions based on incentives, natural rights, expression, and antiplagiarism rationales. In addition to the justifications used in the public

³³ *Intellectual Property Lawyers by State in United States*, MARTINDALE, <http://www.martindale.com/intellectual-property/united-states-lawyers-states.htm> (last visited Dec. 19, 2016).

³⁴ *2015 Best Law Firms for Intellectual Property*, VAULT, <http://www.vault.com/company-rankings/law/best-law-firms-in-each-practice-area?sRankID=20&rYear=2015> (last visited Dec. 19, 2016).

³⁵ *Best Law Firms for Litigation – Intellectual Property*, U.S. NEWS & WORLD REPORT, http://bestlawfirms.usnews.com/search.aspx?practice_area_id=55 (last visited Dec. 19, 2016).

perception study, an additional option, "There is no good explanation for having IP rights and laws," was included in this survey.³⁶ The results from the IP justification question are displayed in Table 2. The results show that IP attorneys' perceptions of IP law differ significantly from those of the lay public.

Table 2. IP attorney perceived basis for IP rights.

Basis	N	Percent
Incentives	101	82.8
Natural Rights	10	8.2
Plagiarism	10	8.2
None	1	0.8
Expressive	0	0.0

IP attorneys overwhelmingly view IP rights as designed to serve incentive objectives. This is not entirely surprising. As discussed above, this is the dominant view of IP rights espoused by the United States Supreme Court and by IP experts.³⁷ It appears that as individuals go through the process of learning about and practicing IP law, they come to believe in the incentives justification. That being said, even for individuals who had been practicing law for some time, a small group still believe in the natural rights and plagiarism bases.

Attorneys' perceptions about the proper basis for IP rights correlated with their beliefs about how strong IP protection should be. Those attorneys who perceived an incentives basis for IP rights believed that patent rights should be stronger than those who perceived a natural rights or plagiarism basis. Those attorneys who perceived a plagiarism basis for IP rights believed that copyright rights and trademark rights should be stronger than those who perceived an incentives or natural rights basis.

³⁶ There was also an option for "Another reason," which seven participants selected.

³⁷ See *supra* text accompanying notes 1-7.

The results indicate that the incentive basis for IP rights can function for sophisticated parties, that is, parties who have access to IP attorneys. To the extent such attorneys are consulted, they are likely to advise their clients consistent with this consequentialist rationale for the law. On the other hand, the results also indicate that the expressive and natural rights bases will have a particularly hard time functioning as accurate drivers of IP rights in the real world. The implications of the study results for the operation of IP law are the topic of Part III.

III. HOW POSITIVE PERSPECTIVES AFFECT NORMATIVE PREFERENCES

Both popular and attorney perceptions of IP rights can have significant effects on how IP rights function in the world and on the perceived legitimacy of IP law. These effects are explored in the following sections.³⁸

A. *Popular Preferences for Weaker Intellectual Property Rights*

Understanding the popularly perceived justification for IP rights only tells part of the story about how the law plays out in society. It is also important to comprehend how individuals react to potential IP rights in particular instances, regardless of the perceived basis for the rights. Olson, Fast, and I conducted a third study that provided a more detailed examination of individual perceptions of and preferences for IP rights in specific contexts. This study used vignettes to test six different fields of potential IP rights: medicine, electronics, software, books, music, and painting.³⁹ Each vignette described a scenario depicting one person copying another person's idea, expression of an idea, or completed creative product. Four hundred forty-three adults located in the United States took part in this study, again recruited through Amazon's Mechanical Turk. Forty percent were female and the age range of participants was nineteen to seventy-eight years old ($M_{\text{age}} = 33.84$, $SD = 12.08$).

³⁸ Portions of Part III are drawn from Mandel et al., *supra* note 1.

³⁹ *Id.* at 934. The subject matters tested thus explored various areas of copyrightable and patentable works, but did not explore trademark protection.

The results revealed that the general public tends to believe that IP laws are too strong. Across scenarios, participants believed that copying should be allowed to a greater extent than they believed IP law permits and to a greater extent than the law actually provides.⁴⁰

The disconnect between public preferences and IP law can be seen by examining participant responses across the idea/expression divide. The studies tested whether people believe that ideas themselves, the expression of ideas, or complete creative products should be protected by IP rights. Unsurprisingly, we found that participants viewed it as most acceptable to copy an idea, followed by the expression of an idea, followed by copying the complete creative product. Perhaps more surprisingly, although a significant majority of respondents in every subject matter believed that copying of ideas should be permissible, responses to the expression conditions were more mixed. Though IP law would prohibit copying in each of the tested expression conditions, a majority of respondents believed that copying should be permitted in four of the six expression scenarios. These scenarios included copiers who duplicated the chorus, additional lyrics, and some of the melody from a song; painted their own picture of an artist's collage; used a new process to copy a patented vaccine; and reverse engineered and copied a patented semiconductor chip. Summing across scenarios, a slight majority of respondents thought that copying of expression should be permitted in general.

Even in the scenarios involving complete duplication of a creative product, the public was not always supportive of IP rights. In one of the six scenarios, the majority of respondents believed that copying should be permitted, and in two other scenarios only a slight majority of respondents favored prohibiting copying. Overall, we found that the public believes there should be weaker IP protection than the law provides. We also found that popular preferences are highly context dependent, varying significantly across different subject matter domains.

⁴⁰ *Id.* at 937.

B. *The Plagiarism Fallacy in Intellectual Property Law*

In addition to the conditions described above, Olson, Fast, and I also tested a variety of potentially mitigating circumstances. For example, we investigated whether participants believed that copying should be permitted if the copier provided attribution to the original creator in relation to making an unauthorized copy. While attribution is never a defense under IP law,⁴¹ attribution would mitigate plagiarism concerns.

The results revealed a significant effect for attribution in all six of the subject matters tested. Summing across vignettes, nearly two-thirds of the population believed that providing proper attribution to creators should enable the free copying of their IP works and inventions.⁴²

The public's perception of the importance of attribution in copying permissibility is consistent with other research reporting that creators of intellectual works highly value the right of attribution. For instance, in a series of experiments, Christopher Jon Sprigman, Christopher Buccafusco, and Zachary Burns found that IP "creators are willing to sacrifice significant economic payments in favor of receiving attribution for their work."⁴³ Similarly, Jessica Silbey conducted a series of in-depth interviews with a variety of people involved in the creative process and found that concerns about proper attribution and credit were pervasive.⁴⁴ Collectively, these studies suggest that

⁴¹ *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 142–43 (2d Cir. 1998). Nonattribution in the form of a disclaimer of any relationship with a referenced author could sometimes provide a defense to copyright infringement. For example, in a lawsuit for copyright infringement in a case involving a trivia book about the television show *Seinfeld*, the trivia book included the proviso that it "has not been approved or licensed by any entity involved in creating or producing *Seinfeld*." *Id.* at 136. The court held that this was not enough to negate the factors militating against a finding of fair use in the particular case but left open the possibility that such a disclaimer could be relevant in a closer case. *Id.* at 141–46.

⁴² Mandel et al., *supra* note 1, at 950.

⁴³ Christopher Jon Sprigman et al., *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1390 (2013).

⁴⁴ See generally JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

there is a significant disconnect between how IP law treats attribution—or fails to treat it—and how creators and the general public understand attribution and IP rights.

These attribution results are contrary to current law. A legal rule permitting attribution to defeat infringement liability would essentially eviscerate IP protection. Such a doctrine would mean that one could freely copy another's copyrighted work or patented invention simply by providing appropriate source credit to the actual creator. An attribution defense would effectively replace copyright and patent law with law that simply prohibits plagiarism. The majority of the public appears to favor such a practice, at least when queried about the permissibility of copying behavior in a factual context.

Exposing the plagiarism fallacy in IP law helps elucidate a variety of previously puzzling common behaviors. For example, millions of YouTube videos state, “no copyright intended” or “no copyright infringement intended,” in a legally misguided belief that such disclaimers provide protection against copyright infringement.⁴⁵ The entry for “no copyright infringement intended” in the *Urban Dictionary* reads, “A phrase put in the title and/or description section of youtube [sic] videos by incredibly stupid people who don't understand how copyright laws actually work.”⁴⁶ These disclaimers provide no protection doctrinally, and therefore may not appear to make sense, but they are logical if one believes that IP rights are directed at prohibiting plagiarism.

The plagiarism fallacy also likely helps to explain the apparent widespread failure of IP owners' warnings and threats concerning IP infringement.⁴⁷ Despite a proliferation of

⁴⁵ This data was gathered by performing a search on YouTube with the phrase “no copyright intended” and “no copyright infringement intended.” *No Copyright Intended*, YOUTUBE, https://www.youtube.com/results?search_query=no+copyright+intended (last visited Dec. 19, 2016); *No Copyright Infringement Intended*, YOUTUBE, https://www.youtube.com/results?search_query=no+copyright+infringement+intended (last visited Dec. 19, 2016).

⁴⁶ *No Copyright Intended*, URBAN DICTIONARY (Dec. 12, 2009), <http://www.urbandictionary.com/define.php?term=No+copyright+infringement+intended&defid=4431901> (last visited Dec. 19, 2016).

⁴⁷ Jenna Wortham, *The Unrepentant Bootlegger*, N.Y. TIMES (Sept. 27, 2014), <https://www.nytimes.com/2014/09/28/technology/the-unrepentant-bootlegger.html>; Ernesto Van der Sar, *RIAA Warns 1 Million Copyright Infringers a Year*,

campaigns declaring, “infringement is theft” and “copyright violations are theft,” a substantial amount of infringing activity continues.⁴⁸ This disconnect may exist because the popular understanding of these phrases is different from IP owners’ intended meaning. Since the most common perception for the basis of IP law is antiplagiarism, many people likely view such proclamations as a basic declaration that one should not copy another person’s expression without attribution. Thus, the average member of the public may agree with the statements verbatim, but the campaigns do not convey their intended meaning because the public has a different understanding of the word “theft” when used in such slogans.

More broadly, the plagiarism fallacy findings shed new light on the common perception that the public tends to be ethically dismissive or indifferent towards IP rights. Instead, this research indicates that experts have failed to comprehend how the public actually perceives IP law. Understanding how the public perceives IP is critical not only for explaining user behavior, but also for understanding how the wide variety of creators who are unknowledgeable about IP law may react under the IP system.

C. *The Legitimacy of Intellectual Property Law*

The public’s preferences for weaker and different IP law creates challenges not only for achieving the socially desired objectives of the law, but also for the legitimacy of the law. Widespread disagreement with the substance of a law undermines its perceived legitimacy.⁴⁹ Where laws are not perceived as legitimate, they are less likely to affect citizen behavior and less likely to achieve their desired goals.⁵⁰

TORRENTFREAK (July 4, 2010), <https://torrentfreak.com/riaa-warns-1-million-copy-right-infringers-a-year-100704>.

⁴⁸ Peter J. Karol, *Hey, He Stole My Copyright! Putting Theft on Trial in the Tenenbaum Copyright Case*, 47 NEW ENG. L. REV. 887, 889–90 (2013); Donald P. Harris, *The New Prohibition: A Look at the Copyright Wars Through the Lens of Alcohol Prohibition*, 80 TENN. L. REV. 101, 103, 138–39 (2013).

⁴⁹ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 380–82 (2006); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 L. & SOC’Y REV. 165, 183 (2001); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 45–46, 64 (2006).

⁵⁰ E.g., Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence*

Popular legitimacy appears to be a particular challenge for IP law because there are disconnects both concerning lay perceptions of the basis for the law and, relatedly, concerning the strength of protection provided by the law. The gap between public perception and the law raises questions concerning whether providing greater education about IP law could change people's perceptions and consequently improve both the function and the legitimacy of the law. The evidence is to the contrary.

First, despite the proliferation of advertisements and warnings through a variety of media seeking to encourage respect for IP rights and reminding users of potentially strict penalties for illegal infringement, widespread infringing behavior continues.⁵¹

Second, though there appears to have been a recent rise in attention to IP, the general public retains an extremely low level of knowledge about the law. On average, the national sample of United States adults in our vignette study discussed above correctly answered only one-and-a-half questions better than chance on a basic ten question IP law quiz.⁵² This lack of knowledge about IP rights alone raises challenges for the law.⁵³ Equally important for our purposes, study participants' knowledge of IP law did not affect their opinions about what the law should be.⁵⁴ Both high-knowledge and low-knowledge individuals similarly believed that IP law should be weaker than it currently is. This result is consistent with other studies that have found that people generally do not distinguish between what the law is and what they believe it should be.⁵⁵

Theory, 5 REV. L. & ECON. 347, 367–68 (2009) (discussing lack of support for the theory that changes in the law produces corresponding changes in behavior, based on data concerning citizens' perceptions of marijuana possession legal penalties); Tyler, *supra* note 49, at 45–46, 64 (finding that people's willingness to comply with the law is related to the perceived legitimacy of the law).

⁵¹ Karol, *supra* note 48, at 889–90; Harris, *supra*, note 48, at 103; *cf.* Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1194–95 (1994) (examining the psychological limitations of the effectiveness of product warnings in the tort context).

⁵² Mandel et al., *supra* note 1, at 960.

⁵³ See, e.g., MacCoun et al., *supra* note 50, at 347–48 (explaining that marijuana prohibition laws cannot be effective deterrents if the public is unaware of them).

⁵⁴ Mandel et al., *supra* note 1, at 972.

⁵⁵ See Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410 (2005) (finding a correlation between people's views about compliance with laws and their views about whether the laws were just); Tyler, *supra* note 49, at 45–46, 64 (finding

In a related vein, participants reported extremely limited experience with IP. Only five percent of the study respondents identified having any experience working in connection with IP law and just six percent of respondents reported having “any . . . current or past experience in connection with intellectual property rights.”⁵⁶ In reality, however, considering that the study platform was Amazon’s Mechanical Turk, “most participants were presumably regular internet users and very likely had ‘experience in connection with intellectual property rights’ almost daily.”⁵⁷ Awareness of this interaction, however, like their knowledge of IP rights, was extremely limited.

Third, in our most recent series of experiments, Olson, Fast, and I directly tested the ability of information to affect lay individuals’ perceptions about the basis for IP rights.⁵⁸ Participants read one of six arguments about the justification for IP protection. These justifications included incentives, natural rights, expressive rights, plagiarism, commons, and a control group—no argument. We ran the experiment in two different formats. The first format involved short, one-paragraph descriptions of the justifications; the second involved extensive descriptions and defenses of the justifications that drew on references to the Constitution, famous historical creators—Thomas Edison and Mark Twain—and current IP issues. Approximately six hundred adults located in the United States and recruited through Amazon’s Mechanical Turk took part in this study.⁵⁹

The results are nuanced. In general, participants were not responsive to any of the traditional justifications for IP rights. That is, participants who read the incentives, natural rights, or expressive rights descriptions did not tend to have different responses from those in the control group or from those who read

that people’s perceptions of the legitimacy of law is greater when the law is consistent with people’s beliefs about what the law should be); see also Christopher Slobgin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 96–100 (2013) (finding mixed results for the relationship between compliance and belief in laws being just).

⁵⁶ Mandel et al., *supra* note 1, at 960 (alteration in original).

⁵⁷ *Id.*

⁵⁸ Anne A. Fast et al., *Experimental Investigations on the Basis for Intellectual Property Rights*, 40 L. & HUM. BEHAV. 458, 458 (2016).

⁵⁹ *Id.* at 461, 466.

a different one of these descriptions. This was true both with respect to general IP rights questions and to questions about rights in specific IP contexts. On the other hand, participants in the commons condition, and to a lesser extent participants in the plagiarism condition, tended to become less supportive of IP protection than those in the incentives, natural rights, expressive rights, and control conditions.⁶⁰ In other words, arguments about the justification for IP rights appeared to display a one-way ratchet; they could convince participants that rights should be weaker, but not that rights should be stronger.

Though the ecological validity of such experiments is always a question, this study indicates that IP law will continue to face significant legitimacy challenges under any of its traditionally conceived justifications. Even with extensive explanations of incentive, natural rights, and expressive rationales for IP rights, people did not tend to change their opinions about the law. In the real world, it is unlikely that even this strong an information campaign could be implemented, indicating that the gap between popular preferences and IP law will likely remain.

CONCLUSION

The studies on lay and IP attorney perceptions of IP rights paint a daunting picture of the nexus between IP law's means and ends for each of its traditional policy justifications. An incentives basis for IP law may be able to function relatively well for sophisticated parties in fields where IP owners can unilaterally control copying behavior to a significant degree. Fields fitting this profile may include the pharmaceutical industry, the semiconductor industry, and the theater-run motion picture industry. In other contexts, the incentives basis appears to be significantly checked. The natural rights and expressive bases for IP rights are likely even more challenged and can only succeed in very limited circumstances. With few IP attorneys or lay individuals believing in such perspectives, it is unlikely that many creators or consumers operate under such conceptions. While IP law may still be enacted consistent with these principles, such rationales are unlikely to affect behavior or produce the accurate enforcement of IP rights. Finally,

⁶⁰ *Id.*

challenges to the legitimacy of IP law are likely to continue as long as the law is modeled on conceptions that are not widely shared.