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The Centrality of Social Justice for an Academic Intellectual Property Institute

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THE CENTRALITY OF SOCIAL JUSTICE FOR AN ACADEMIC INTELLECTUAL PROPERTY INSTITUTE

Steven D. Jamar*
Lateef Mtima**

"A lawyer is either a social engineer or ... a parasite on society."
-Charles Hamilton Houston

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I. INTRODUCTION

A law school institute should be built upon a theoretical or practical foundation from which to assess the substantive area of law that is its focus. Without such a grounding, an institute can too easily devolve into performing merely instrumental analysis of the law from a narrow, received perspective. With proper grounding, however, the vision of the institute expands and can more effectively serve the pub-

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lic interest, which is the ultimate justification for law schools and especially for their institutes.\(^1\) While individual lawyers serve particular clients, the legal system and the law schools who create the lawyers for that system serve a higher purpose. The Institute for Intellectual Property and Social Justice, Inc. (IIPSJ) is grounded upon the inclusion and empowerment aspects of social justice as reflected in its slogan: “Advancing Ideas, Encouraging Enterprise, Protecting People.”\(^2\) IIPSJ’s main programs include creating and administering a social justice and community empowerment program in conjunction with the intellectual property curriculum at the Howard University School of Law which focuses primarily inward on HUSL educational programs and a set of outwardly focused social justice programs, the main business of IIPSJ proper.\(^3\)

Building an intellectual property institute upon a social justice premise is particularly piquant in the field of intellectual property law because the constitutional purpose of the intellectual property clause is to advance and shape American culture.\(^4\) The social engineering mechanisms to accomplish this end are to provide copyright and patent protection for writings and inventions.\(^5\) In the field of patent law there is an explicit quid pro quo: inventors get twenty years to monopolize commercial exploitation of their inventions, not merely to provide society with innovative products and methodologies but also in exchange for disclosing the “art” necessary to exploit the patent.\(^6\)

The objective of cultural advance is, if possible, even more explicitly articulated in the field of copyright.\(^7\) Commercially valuable exclusive rights to exploit works (subject to various statutory limitations and exceptions and rights of users) for a very long time are granted to copyright holders, not for the purpose of making them rich but rather as a means to the end of advancement of society through the creation and dissemina-

\(^1\) See infra Part V and accompanying text.

\(^2\) U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have power . . . to promote the progress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors . . . the exclusive [r]ight to their respective [w]ritings . . . .”).


\(^6\) See, e.g., Timothy R. Holbrook, The More Things Change, the More They Stay the Same: Implication of Pfaff v. Wells Electronics, Inc. and the Quest for Predictability in the On-Sale Bar, 15 BERKELEY TECH. L.J. 933, 937 (2000) (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480–81 (1974)) (“The enablement requirement is rooted in the fundamental quid pro quo that underlies the patent system. The patentee is afforded the twenty year statutory term in exchange for disclosing his invention to the public so as to enhance the public’s knowledge base.”); Winslow B. Taub, Comment, Blunt Instrument: The Inevitable Inaccuracy of an All-or-Nothing On-Sale Bar, 92 CALIF. L. REV. 1479, 1495 (2004) (noting “the statutory bargain codified in the patent laws: a twenty-year monopoly in exchange for providing the public with a significant invention”).

tion of works and the information contained in them.  

Grounding an intellectual property law institute on principles of social utility in general, or as in the case of IIPSJ, on social justice principles (a subset of the broader category of social utility), is important for a third reason as well. In the technological society of our Information Age, intellectual property has transcendent importance, penetrating, as it has, every aspect of our lives in ways unimagined a few decades ago and in ways so pervasive as to be essentially unnoticed or at least taken for granted (until it breaks down) in our day-to-day lives. The Internet and all forms of digital information technology have become vital components of American daily life. Banking, commerce, communication, and exchange of images and text and ideas online are part of the daily fabric of the lives of tens of millions of Americans and indeed of hundreds of millions of others around the globe. Intellectual property law both facilitates and mediates the impacts of this technological explosion.

Because of the ubiquity and increasingly user-friendly and transparent implementations of intellectual property, people are not only more routinely intimate users and consumers of intellectual property but are also more often creators and purveyors of works which are themselves intellectual property, especially in the copyright field. People play video games and use software on computers; they now own copies of movies that were previously only available for viewing in commercial theaters; they make copies of music and share those copies better and more easily than ever before; they make mash-ups of video and music and post them online; and they had shoot their own videos or record their own music and post them. In short, we not only listen, watch, and consume, but we also use, reconfigure, and create.

Ultimately, intellectual property today significantly impacts our quality of life not merely in aesthetic (art, music, films, etc.) and technocratic (cars, mobile phones (with cameras), Internet) ways. Consequently, the ability to access, use, and create using the levers of intellectual property already in place affects the quality of life and the justness of society in important ways. One important area is providing pharmaceuticals at af-

8. Id. at 558 (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)) (internal quotations omitted) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); see also Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privileges that Congress has authorized . . . are limited in nature and must ultimately serve the public good."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1989) (stating the purpose of copyright is to promote wide dissemination of information, literature, music, and other arts); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (same).


10. Id.

11. Id.

12. Id. at 652–53.

13. Id. at 653.

14. Id.
fordable rates. In the case of AIDS and other worldwide health epidemics, the importance of the health issue is of the first order worldwide.\textsuperscript{15} Indeed, the recent responses to the AIDS crisis in the lowering of prices of some drugs, and the conduct of some foreign countries in refusing to prioritize IP rights over public health illustrates a balancing of interests toward the greater social good (an approach not always consistent with prevailing attitudes in the United States).\textsuperscript{16}

This Article discusses the importance of grounding a law school intellectual property institute on social justice. This is not to say that all IP institutes at all law schools either are or should be so grounded. We assert the more limited proposition that such grounding is valuable and, in the case of the IP institute at Howard University, central. As we show, building an IP institute around a social justice perspective can facilitate proper emphasis on exploring intellectual property law as a mechanism for social justice in the Information Age. The advent of digital technology and related advances provide a means by which to utilize intellectual property regimes to bridge the societal goals of social justice and equality with those of cultural progress and global competition and hegemony.\textsuperscript{17} Indeed, a principal justification for protecting intellectual property is to encourage the creation and dissemination of information and knowledge,\textsuperscript{18} and the ultimate efficacy of this civic agenda is dependent upon the pervasiveness of its reach: every citizen should have effective access to both.\textsuperscript{19} Thus, in fulfilling its function in the training of the legal profession to implement this agenda, a law school intellectual property institute can illuminate and fulfill the constitutional mandate of intellectual property social utility by embracing a social justice mission in its pedagogy, scholarship, and public activism.

II. THE SOCIAL JUSTICE OBLIGATIONS OF LAW SCHOOLS AND LAWYERS

Lawyers and the law schools that prepare them for practice have explicit professional obligations to serve the public. Under the American Bar Association standards for accreditation of law schools, law schools must provide an educational program that ensures that its graduates:

(1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
(2) receive basic education through a curriculum that develops:
   (i) understanding of the theory, philosophy, role, and ramifications of the law and its institutions; . . .

\textsuperscript{15. }\textit{Id.}
\textsuperscript{16. }See \textit{id.}
\textsuperscript{17. }\textit{Id.}
\textsuperscript{18. }\textit{Id.}
(3) understand the law as a public profession calling for performance of pro bono legal services.²⁰

The Model Rules of Professional Conduct, a version of which governs the professional responsibility of lawyers in nearly every state, explicitly recognizes the responsibility of lawyers to serve not only the parochial interests of their clients but also the public good.²¹ While individual lawyers primarily serve their particular clients, the legal system and the law schools who create the lawyers for that system serve a higher purpose.²² In the very first paragraph of the Preamble, the Model Rules provide: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”²³ Elaborating on this theme, the Model Rules further provide:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.²⁴

In short, lawyers, as members of the legal profession, have obligations to improve the law and to work to include everyone in the legal system of justice.²⁵ The Model Rules speak not merely of representing clients in the criminal justice system but rather speaks more broadly to inclusion in helping people from all economic and social strata to equal access to the protections, and, we would submit, opportunities available under our legal regime.²⁶ “Legal assistance” means more than addressing wrongful
evictions and denial of Social Security benefits. It also includes, or should include, empowering people to overcome historical social, economic, cultural, and racial barriers to achieve the opportunity to achieve full participation in the wealth of society and culture. In short, lawyers are bound to work for social justice and law schools have an affirmative obligation to prepare lawyers to do exactly that.

Within this general context of the public obligations of lawyers and the institutional obligations of law schools to prepare lawyers to meet these obligations, the centrality of social justice to the mission of every law school becomes obvious. Regardless of however many variations on the core concept of social justice there may be and regardless of the differences in emphasis upon how to achieve social justice in the manifold fields of the law, the central point is undeniable: social justice is central to the mission of law schools.

III. LAW SCHOOL INSTITUTES: A PROFESSIONAL PEDAGOGY

Law schools create institutes, centers, and programs in a variety of areas for a variety of reasons. Common areas are alternative dispute resolution, civil and human rights, environment, and, more recently, intellectual property. Some programs grow out of a particular faculty member's interest or expertise and entrepreneurial spirit to make it happen; some programs grow out of an institutional commitment to a particular area; some develop from a school's felt need to differentiate itself from others; and some such programs have a more pragmatic instigation, such as the need to remain competitive with peer institutions for standing in the field or the ability to attract scholars and students to the school.


28. Id.


30. See id. (citations omitted) ([I]t remains vitally important that there continue to be calls for law schools to embrace a social justice mission. It matters not whether such calls are targeted with humility or raised as a social call to arms. There is room for both approaches in the discourse. What matters most is that, as a nation, we continue to strive to give greater content to the meaning and understanding of equal justice. That important undertaking rightfully should be a principal responsibility of our law schools."); Voyvodic & Medcalf, supra note 27, at 103 (University of Windsor's Clinical Law Program at Legal Assistance of Windsor (LAW) has placed law students in a downtown community legal clinic staffed by social workers and lawyers. The article advocates for a "renewed campaign to make . . . explicit [the goal of] enabling advancement of the social justice mission."). Of course, understanding legal doctrine and developing skills needed for effective lawyering are the daily stuff of law schools, but our point is that law schools not only need to prepare students to represent individual clients in individual situations but also to prepare students to address broader societal concerns.

31. See infra Part VI and accompanying text.

32. See infra Part VI and accompanying text.
Perhaps the universal impetus for law school institutes derives from the nature of law schools as not merely trade schools nor purely academic schools. Rather they are professional schools with one foot in the world of trade schools—providing students with knowledge and skills needed to practice law—and the other foot in academe, a high-level intellectual endeavor of faculty doing research and publishing scholarship on the subject matter of the law and its effect on society. Law school institutes can help provide a bridge between these two pedagogical objectives: professors teach in the classroom and individually do research and publish their thoughts. Institutes can help provide focus, expertise, and structure both to teaching in a subject area and to a school’s collective scholarship in a particular field. IIPSJ at HUSL, particularly through the law school intellectual property program, provides the educational services focused internally on students and curriculum. IIPSJ proper, both outside of the law school setting as well as within its institute at HUSL, provides the scholarship, research, and public advocacy central to its purpose.

The trade school aspect seeks to prepare lawyers to practice law. Through doctrinal courses (especially bar courses) and skills courses (especially legal research and writing courses and live-client clinics), law schools prepare students for nearly all of the sorts of practice lawyers regularly engage in. Even this trade school aspect involves intellectual preparation in ways teaching the skills to be a plumber does not. The tools in our students' toolboxes are knowledge of doctrine; intellectual ability to analyze, synthesize, and reason syllogistically and analogically; problem-solving; and a variety of communication skills. These are intellectual and social and political skills. Law schools prepare lawyers to use these skills. To be effective, it is more important to know what the law is than what the law should be. The former is relatively objective; the latter necessarily subjective depending as it does upon one's view of a just society.

As central as this trade-school aspect of law school is (preparing lawyers to practice law through inculcating its charges with the knowledge and skills needed to function as lawyers), law schools also have an important scholarly and academic orientation. Lawyers are more than mechanics who read and apply the law—they participate in the interpreting, shaping, and envisioning of the law. Accordingly, in order to fully prepare their charges and for other motivations, law professors, individually, and thus law schools (which are comprised in part of law faculty), institu-

33. See Voyvodic & Medcalf, supra note 27, at 106–07.
34. See id. at 113–14.
35. See infra Part VI and accompanying text.
36. Id.
38. Id.
39. Id.
40. Id.
tionally, critically examine the law and the skills being taught. Such scholarly examination of doctrine and policy from merely within a field, such as patent law, is valuable—critical even.  

Institutes that bring together scholars to explore ideas thus serve a valuable function within law schools and for the legal profession in general. Those that limit themselves to explorations of the law in this more narrow perspective are serving the public interest and helping their host law schools meet their obligations under the ABA accreditation standards. However, absent some driving social utility raison d'etre external to the particular legal domain, any discipline, including the law or a field within the law, can become narrow and insular. Having a broader driving principle can help reduce this natural tendency. The broader principle can include examination of any area of law from various perspectives including particular philosophical, economic, or political theories.

Examination of the effects of particular doctrine on society and the extent to which it comports with stated public policy is one such valuable perspective. For a school like Howard University with its commitment to social justice generally and its historical work in civil rights, an institute founded on and evaluating an area of law from a social justice perspective is natural and, indeed, proves a valuable rudder to the institute in the pursuit of its mission.  

IV. PURSUING INTELLECTUAL PROPERTY SOCIAL JUSTICE: INCLUSION AND EMPOWERMENT

We have previously addressed the pursuit of social justice in the interpretation, application, and adaptation of the intellectual property law.  

42. About IIPSJ, supra note 3.
43. See generally Steven D. Jamar, Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context, 19 WIDENER L.J. 843 (2010); Jamar, supra note 4; Mtima, supra note 19; Lateef Mtima & Steven D. Jamar, Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information, 55 N.Y.L. SCH. L. REV. 77 (2010); Mtima, supra note 41. Other scholars and commentators have subsequently explored the intersection of the intellectual property law and the achievement of social justice objectives. See Mary W.S. Wong, Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights, 26 CARDOZO ARTS & ENT. L.J. 775, 830 (2009) (citations omitted) (“Many ... scholars share the belief that the current international IP regime does not adequately accommodate concerns of distributive social justice, and the relatively simplistic utilitarian balancing act it currently espouses tends to favor IP producers (who are located primarily in developed, mostly Western, countries). It does not easily allow for non-economic developmental considerations that are emphasized by human rights jurisprudence and norms, and that are socially beneficial objectives that IP regimes ought to incorporate. Alongside specific proposals for addressing these inadequacies, [these] scholars ... support (either explicitly or implicitly) a broader approach that incorporates social and cultural theory, and that more clearly maps to less utilitarian objectives such as self-actualization, freedom of choice, and human development.”); see also Keith Aoki, Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency and Development), 40 U.C. DAVIS L. REV. 711 (2007); Anupam Chander & Madhavi Sunder, Foreword: Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice, 40 U.C. DAVIS L. REV. 563, 564
The two main watchwords of IIPSJ’s social justice emphasis are inclusion and empowerment. A more formal and encompassing description is as follows:

Social justice is a protean concept. Social justice encompasses at the very least inclusion of everyone in the benefits of society, culture, economic opportunity, and technological possibilities. People should be able to share fully the bounty that has been created and is being created. Sharing in the bounty includes being able to use what is to create what is to be; everyone should be able to use the past works to create new works.

Within the context of the intellectual property law, the achievement of IP social utility is co-dependent upon the achievement of a measure of IP social justice. As we have previously written:

Social justice is part of the progress that copyright law intends to advance. It includes the aspirational ideal of substantive equality as well as the relatively easily addressable procedural equality. Social justice includes at least some aspects of individual liberty (e.g., autonomy) as well as incorporating some communitarian liberty values such as religious association, pursuit of legitimate group interests, and civic virtues such as voting. Social justice includes not only access to, but also inclusion in, the social, cultural, and economic life of the country. Indeed, it extends beyond inclusion in social, cultural and economic life to full participation in and ability to affect the direction of civil society in all its manifestations. Social justice thus rests upon the core values of equality, liberty, and advancing the general welfare enshrined in the Declaration of Independence and Preamble to the United States Constitution.

These principles are derived from the grant of power to Congress to bestow property rights in creative, expressive works, and in innovative inventions and discoveries: the power is granted to advance progress for all, not for the benefit of a privileged few; it is for the general welfare, not the specific welfare of someone. When Congress exercises this federal grant of power, the resulting law should assure that the benefits of the


46. Mtima, supra note 19, at 122-29.


48. U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors
intellectual property regime are distributed widely and fairly and not hoarded by any particular class or regulated and burdened by any individual state.\textsuperscript{49} Thus, the inherent social justice function of the intellectual property law prescribes equal access to the creative fruits of others and a concomitant opportunity and responsibility to participate in the creation and exploitation of additional works and inventions.\textsuperscript{50} In short, the Constitutional intellectual property mandate directs policymakers to act affirmatively to advance the cause of social justice through the system of intellectual property protection.\textsuperscript{51}

The social justice requirements of the intellectual property laws are sometimes obscured, however, because such laws can seem complex and insular, remote from the diurnal social needs of people. Some may consider it a field unto itself—best left to experts.\textsuperscript{52} Patent lawyers need to know the doctrine and processes of patent law and typically also need to know the intricacies of specific scientific and technical fields of endeavor.\textsuperscript{53} Copyright lawyers need to know the doctrine and processes of copyright law and how to distill legally protectable elements from expressive works.\textsuperscript{54} This level of knowledge is necessary and may often be sufficient for most practitioners.

But for law teachers and legal scholars, mere doctrinal facility is not enough. Teachers and scholars have a further responsibility to develop the law—to examine and critique it, and help it evolve to meet new challenges and achieve traditional objectives in changed circumstances and evolve to adapt to and adopt new objectives as appropriate over time. Of course, this can be done from a variety of perspectives, including internally or intrinsically from within the specific area of law itself or externally from some other perspective. While an intrinsically bound examination can expose problems with the law, including some that may impact society, an externally-based examination is the more sure path.\textsuperscript{55} An assessment of the law should, indeed, in a democracy must ultimately

\textsuperscript{51} See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730–31 (2002); Sony Corp. of Am., 464 U.S. at 429; Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980) (making the same observations in connection with the patent law); 1 Paul Goldstein, Copyright § 1.14 (2d ed. 2002); Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1107 (1990) (“The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”); discussion supra note 8. See generally Mtima, supra note 19.
\textsuperscript{52} See Mtima, supra note 41, at 572–73.
\textsuperscript{53} Model Rules of Prof'L Conduct, at R. 1.1 (1983).
\textsuperscript{54} Id.
\textsuperscript{55} Jamar, supra note 4, at 656.
examine the effect of that area of law on society. Given its highly technical and sometimes inaccessible features, typically implemented by narrowly focused experts, it is important that the effects and the purposes of the intellectual property law be examined from an external perspective. Moreover, as intellectual property has come to drive and pervade so much of our economic, social, and cultural life, it is far too important to be left to cloistered experts narrowly examining it only from within.

The social utility and justice opportunities and challenges presented by the revolutionary advances in digital information technology provide an apt illustration. Digital information technology has made possible unprecedented access to copyrighted works and other protected material through the Internet and a variety of digital media formats. By providing more people unprecedented access to copyrighted material, these same technologies have also allowed users to engage in new forms of creative expression not only with respect to their own original expression but through the reuse or "re-mix" of pre-existing (and previously static) copyrighted material. It has, thus, led to both the creation of new types of works and also provided unheralded opportunities for the development, dissemination, and exploitation of all kinds of individual creative expression, traditional and progressive.

Digital information technology has also sparked the genesis of new IP business models and has revolutionized distribution channels for the commercial dissemination of traditional works and innovations. It has also

56. Id.
58. Mtima, supra note 19, at 99.
59. See Jamar, supra note 43, at 843-44; Lawrence Lessig, Creative Economies, 2006 Mich. Sr. L. Rev. 33, 37-38 ("[Internet use and dissemination] is digital creativity. This is digital remix... Anybody with a $1,500 computer can take images and sounds from the culture around us and remix them together to express ideas and arguments more powerfully than anything any of us could write as text. This is remix with more than text, yet it is the literacy of a twenty-first century. It is what kids do with computers once they are finished hoarding all of the content that was ever produced in the history of man. When they grow bored with the hoarding, what do they do next? They find things to do with the content they've collected. And what do they do?... This is what they do. This is writing for them. It has extraordinary creative potential. It will change what whole fields of creativity look like. More important, it has extraordinary democratic potential—changing the freedom to speak by changing the power to speak, making it different. Not just broadcast democracy, but increasingly a bottom-up democracy. Not just the New York Times democracy, but blog democracy. Not just the few speaking to the many, but increasingly peer-to-peer. This is what this architecture begs for—this form of expression, then this expression set free on a free digital network that anyone in the world can access as they demand. This is the invitation that digital technologies give to our cultures.").
60. Mtima, supra note 19, at 99.
increased access to information regarding new and pre-existing inventions and their development and applications and presented new channels for goods and services distribution and source identification.\textsuperscript{62} It has forever changed the nature of geographic limitations on access to, control of, and dissemination of ideas, information, and achievements. Indeed, in the context of global culture, digital information technology presents attractive possibilities for developing nations. It encourages and enables marginalized groups and cultures to evolve beyond their 20th century status as intellectual property consumers. A poignant example is that of William Kamkwamba, who grew up in Masitala, Malawi, a small rural town without any electricity.\textsuperscript{63} When he was fourteen years old, he saw a wind electric generator in a textbook and set to work building one. He built several to provide power to charge cell phones, to pump water from the village well, and to provide light, radio, and television to his home and community—all this from a picture and a couple of books on electricity and physics in a tiny library stocked by the United States of America. Some four years later, after he had been discovered and brought to a city for a conference and was shown Google and the Internet, he Googled “windmill,” pulled up all sorts of information, and his first thought was,
"Where was this Google all this time?"64

Digital information technology can also encourage developing nations to more pervasively share their indigenous knowledge and creative expression not only to educate outsiders about their beneficial rituals, cultural beliefs, and customs but also in the cause of economic independence and socio-political empowerment.65 The example of India putting its Ayurvedic medical knowledge into an online database is just one example of this.66

At the same time, there are concerns and objections raised by rights holders regarding the impact of the digital information revolution on their property interests and the stability of the intellectual property incentive regime.67 For example, many argue that digital information technology poses an especially pernicious threat to the copyright incentive scheme of authors’ exclusive property rights.68 There is, of course, the thorny problem of unauthorized sharing of copyrighted works in connection with thousands of unauthorized copies of copyrighted works distrib-

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65. IVEY, supra note 45, at 89, 276–77; Lyombe Eko, Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation, 6 COMM. L. & POL’Y 445, 445 (2001) ("[E]xamining emerging Internet law and policy from a comparative, international perspective[,] [t]his complex, multi-cultural, global, information, communication, commercial and cultural platform that the Internet has become is gradually being adapted to the political, economic and cultural realities and interests of specific countries around the world."); Aaron Judson Lodge, Globalization: Panacea for the World or Conquistador of International Law and Statehood?, 7 OR. REV. INT’L L. 224, 232 (2005) ("Continuing into modern times, globalization takes the form of mass media, including worldwide advertising and instant access to information. It involves multinational corporations, banks and advanced technologies such as the Internet."); Matthew Fagin, Comment, Regulating Speech Across Borders: Technology vs. Values, 9 MICH. TELECOMM. & TECH. L. REV. 395, 439 (2003) (citing Daniel Farber, Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech, 16 GA. ST. U. L. REV. 789, 792 (2000)) ("As a conduit for commerce and information, the Internet may significantly impact the formation and maintenance of cultural norms: ‘By reducing communication barriers between people, it can have effects not unlike those of lowered trade barriers. Like World Trade Organization (WTO), the Internet is a powerful instrument of globalization . . . [at the same time] the Internet threatens what limited power local communities have to maintain their cultural integrity.’").
67. See Adrienne Goldsmith, Note, Sex, Cyberspace, and the Communications Decency Act: The Argument for an Uncensored Internet, 1997 UTAH L. REV. 843, 844 ("As with most technological advances, there is a dark side to the computer revolution. The Internet has made the world both larger and smaller, creating new resources and educational opportunities beyond imagination. But it has also left the courts and Congress with the troublesome task of applying traditional legal doctrines to a complex and constantly evolving mode of communication.").
uted on the Internet every day. And the challenges to traditional copyright property interests is not limited to unauthorized duplication and distribution. Because of the ease with which end-users of copyrighted works can now engage in the use of digital material to create new or derivative works, "digital remix opportunities" also pose a serious threat to the property rights of copyright owners, often undermining traditional copyright compensation expectations.

In many cases, these problems are perceived as a direct conflict between the proponents of the copyright social benefits that digital information

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69. See, e.g., id. at 96-97 (internal citations omitted) ("In effect, the Motion Picture Experts Group created a digital audio encoding format, MPEG-1 Audio Layer III (MP3), that would revolutionize the distribution of audio visual media, pose an existential threat to the global recording industry, and shake national intellectual property regimes to the core. As soon as it was launched in 1991, the MP3 audio format quickly became the gold standard for digital audio compression, storage, and transmission. . . . From an intellectual property perspective, the MP3 format facilitated the unauthorized ripping, duplication and dissemination of copyrighted music on online peer-to-peer (P2P) file-sharing networks. Peer-to-peer file-sharing is a system of social networking facilitated by the networking and distributed technologies of the Internet. At its core, early peer-to-peer file-sharing involved the fluid and free exchange of digital music stored in the computer hard drives of members of social networks. P2P file-sharing was facilitated by start-up companies whose software and/or servers held these networks together and made their activities possible. The problem was that the bulk of the material exchanged on these peer-to-peer networks was copyrighted content exchanged without the consent of the copyright holders. . . . Peer-to-peer file-sharing posed significant problems for intellectual property regimes at the national, supranational and international levels. The fundamental problem confronting policy makers was how to apply intellectual property rules and regulations developed for tangible intellectual property assets that exist in real space—music, video programs, videogames, books, photographs, motion pictures, art works, computer software and the like—to digitized, intangible, de-materialized works that exist in cyberspace, or were illegally copied and exchanged online.").


71. See, e.g., Eko, supra note 68, at 114 (citations omitted) ("Peer-to-peer file sharing on the Internet posed a serious threat to the edifice of intellectual property law . . . because its stock-in-trade was mostly unauthorized copyrighted material, and its business model was essentially the free unauthorized exchange of digitized private property. Due to the technological and legal novelty of the online peer-to-peer file-sharing phenomenon, [various countries] sought to bring it within the ambit of its respective intellectual property law regime. All parties that had a stake in the intellectual property regime—governmental entities, the recording industry, royalty collecting agencies, musicians, and interest groups—sought to shape the emerging law of peer-to-peer online file-sharing. The battle for intellectual property in the online environment essentially took place in the judicial and legislative branches of government—often in that order."); Veasman, supra note 70, at 317-18 (citations omitted) ("Today's World Wide Web (Web 2.0) is a new and improved version from the Web of the past (Web 1.0). Web 2.0 is the term commonly used to refer to 'technology that encourages sharing, user input and community.' Specifically, it is a second generation of Web-based services, including blogs, social networking sites, RSS feeds, podcasts, Web APIs, and mashups. . . . Web 2.0 makes user-generated content and interaction possible because, rather than using the PC as its platform as Web 1.0 does, Web 2.0 uses the Internet as its platform. Typical user interaction in the world of Web 2.0 includes tagging content or contributing user content through podcasts, social networking, or blogging. . . . As the American population continues to discover Web 2.0, more and more people use its activities and applications regularly. . . . Possible copyright infringement actions that occur online include: consumer uploading files; knowingly and unknowingly offering copyrighted material for display by the way of web browsing; performing a copyrighted work by way of streaming audio or video or downloading; and sending email.").
technology can bestow upon society as a whole and those who favor the commoditization interests of individual copyright owners, particularly many of the commercial copyright industries.\textsuperscript{72} However, the attendant socio-legal issues are typically far from black and white.\textsuperscript{73} Whereas some acts of unauthorized sharing are certainly illegal and socially counter-productive, not all of this sharing can be so characterized.\textsuperscript{74} Some unauthorized sharing is conducted in ignorance of the copyright legal regime and its relation to the technological freedoms of Internet discourse.\textsuperscript{75} Other acts of unauthorized digital distribution are undertaken as a means of protest against the leading entertainment conglomerates, grounded in the belief that the major corporate copyright holders are engaged in a system of monopolistic price gouging of the public.\textsuperscript{76} Many of these copyright outlaws believe that unauthorized widespread distribution of the copyrighted material that these entities control serves the spirit, if not the letter, of the copyright law.\textsuperscript{77}

\textsuperscript{72} See, e.g., Peter S. Menell, \textit{Can Our Current Conception of Copyright Law Survive the Internet Age? Envisioning Copyright Law's Digital Future}, 46 N.Y.L. SCH. L. REV. 63, 99–102 (2003); Yu, supra note 57, at 7–8; Wendy M. Pollack, Note, \textit{Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium}, 68 FORDHAM L. REV. 2445, 2445–46 (2000) (citations omitted) ("Digitization of copyrighted materials permits instantaneous, simplified copying methods that produce nearly perfect copies of originals. These copies can be digitally delivered to thousands of Internet users. Decentralization and anonymity in cyberspace have allowed for the widespread dissemination of copyrighted materials without permission from their owners.").

\textsuperscript{73} See, e.g., Cynthia M. Ho, \textit{Attacking the Copyright Evildoers in Cyberspace}, 55 SMU L. REV. 1561, 1561–62 (2002) (citations omitted) ("In the context of copyrights on the Internet, different evildoers are identified, depending on who is asked to identify the evildoers. For example, to most consumers, the evildoers in cyberspace are the copyright owners that have stripped the Internet of its freewheeling nature by removing things such as the file-sharing tool Napster. On the other hand, major copyright owners vilify consumers—and those who assist them—for making copies of copyrighted material with little regard for whether the consumers own original copies. The identification of evildoers implicitly discounts the possibility that parties merely possess differing, but reasonable views. Rather, the current polarized vision of evildoers has created a situation in which consumers are immune to allegations of copyright piracy and content owners rush to create new methods—whether legal or technological—to halt consumer copying.").

\textsuperscript{74} Id. at 1561–62.

\textsuperscript{75} Id. at 1562–63.

\textsuperscript{76} Id. at 1566–68.

\textsuperscript{77} See Eduardo Moisés Peñalver & Sonia K. Katyal, \textit{Property Outlaws}, 155 U. PA. L. REV. 1095, 1164–65 (citations omitted) ("We are concerned that, in its strategies of punishment, the law may aim to preclude too much property lawbreaking . . . . [T]he law must take into account the possible socially productive nature of some property lawbreaking, not just its social costs. In fact, total deterrence does not appear to be the goal of most contemporary theorists. Moreover, at least in practice, the degree and likelihood of punishment for most property law violations have left sufficient play in the joints of the system to permit some kinds of intentional lawbreaking to lead to significant legal change. The dynamically evolving technologies and strategies of law enforcement, however, constantly threaten to remove the needed flexibility within the enforcement of property laws . . . . If too effective at deterring crime, inadvertently harsh (or definite) sanctions can stamp out the information benefits that result from some property lawbreaking. In short, dramatic improvements in the ability to detect and punish property lawbreaking have the ability to shift the potential outlaw’s calculus in significant ways, not all of which are socially beneficial. This focus on the possible improvements in the technology of property enforcement to suppress productive lawbreaking is particularly crucial in the context of intellectual
Moreover, the advent of digital information technology presents social justice challenges beyond that of conflicts between rights holders and users.\textsuperscript{78} One particularly persistent problem is the "Digital Divide."\textsuperscript{79} Notwithstanding the plethora of artistic and educational boons made possible by technological advances that allow some Americans to enjoy greater access to knowledge and information, the Digital Divide isolates other citizens from such benefits.\textsuperscript{80} Ironically, the advent of digital formats has even in some ways \textit{diminished} the copyright-mediated experience for some Americans.\textsuperscript{81} While the fortunate are able to experience copyrighted expression in interactive digital formats, the less fortunate remain stranded in a static, analogue world, uninitiated to this brave new world.\textsuperscript{82} As digital formats become the dominant and, in some cases, the exclusive medium for new creative expression, the "unconnected" lose access to many sorts of works and information that exists essentially only online.\textsuperscript{83} To be sure, neither copyright law alone nor intellectual property law more generally is solely responsible for the digital divide—it is a byproduct of economics, public policy, sociological trends, and history, as well as of intellectual property policies and rules.\textsuperscript{84}

These sociological byproducts of the Digital Information Age have refocused attention toward the social utility and social justice obligations of the copyright law by scholars, policy-makers, and practitioners.\textsuperscript{85} The constitutional purpose of copyright to serve the public good through progress in knowledge and arts is a utilitarian one arising out of practical considerations as well as from utopian democratic ideals.\textsuperscript{86} Serving the public good is a social utilitarian purpose and, as developed above, social justice principles are inextricably intertwined with social utility.\textsuperscript{87} Persistent problems of intellectual property inequity and social injustice can impede the social efficacy of the intellectual property law, thereby revealing a functional interdependence between intellectual property social utility and social justice.\textsuperscript{88} This interdependence between social justice, social utility, and the public good makes social justice perhaps the most compelling perspective upon which to analyze the legitimacy of copyright and other intellectual property regimes law today.\textsuperscript{89} Focusing on the overarching social utility and social justice goals of the intellectual property laws provides an appealing, perhaps even compelling approach for
principled, rational balancing of what are both competing and complementary interests.⁹⁰

Indeed, even broader questions regarding digital and other dissemination and exploitation of creative cultural expression outside the protection of the copyright regime can be addressed through empathetic invocation of the social utility goals of the copyright law, by balancing society's interest in the expansion of its store of aesthetic expression against the ultimate benefits that can be gained by exercising appropriate respect for foreign and marginalized cultural institutions and customs.⁹¹

Consequently, when viewed through the lens of intellectual property social utility/social justice interdependence, the traditional developed-versus-developing nation conflict over what should be recognized as protectable intellectual property and how much protection should be afforded can be addressed in ways that advance both classes of national interests.⁹²

There are similar social utility and social justice considerations and objectives in the field of patent law. Patents are awarded not for the mere invention of a novel, useful product.⁹³ The patent requires disclosure of the invention such that those skilled in the pertinent art will be able to duplicate (and learn from) the invention.⁹⁴ This is a broader social requirement than merely benefitting society through providing a new product, method, or drug—society also gains knowledge through dissemination of the advance. Others can then build upon it or develop different ways to accomplish the same end, thereby advancing knowledge even further.

Even the useful effect of the unabashedly social utilitarian requirement of full disclosure is magnified when enhanced by a social justice lens.⁹⁵ What is the point of requiring detailed disclosure if only a privileged few will have a genuine opportunity to study it? Affirmative steps must be taken to ensure that everyone in society has an equitable opportunity to

⁹⁰ Id.
⁹¹ Id.
⁹² See id.
⁹⁴ See, e.g., id. at 1551; Note, The Disclosure Function of the Patent System (or Lack Thereof), 118 Harv. L. Rev. 2007, 2007 (2005) (discussing the potential value of the patent system's disclosure function and reasons why the U.S. patent system seems to be failing in its goal of disseminating information); Jordan P. Karp, Note, Experimental Use as Patent Infringement: The Impropriety of a Broad Exception, 100 Yale L.J. 2169, 2176–77 (noting patent law's requirement that "disclosure describe the invention with sufficient clarity to permit one familiar with the relevant technology to build the invention"); Karp, supra, at 2176 n.45 (citing 35 U.S.C. § 112 (1988) ("The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.").
⁹⁵ See Rebecca S. Eisenberg, Proprietary Rights and the Norms of Science in Biotechnology Research, 97 Yale L.J. 177, 219 (1987).
study and appreciate the advance and, thus, increase society's opportunity for the next leap in the field from whatever sector in society it may come. That is, mere technical disclosure with patents hidden away in a dusty office does not adequately serve social justice interests in inclusion and empowerment. Broader dissemination of the information in accessible form is needed. George Washington Carver studied the achievements of those that came before him as well as the scientific and agricultural challenges of his day and, though he came from a marginalized group, he advanced American agricultural science for American society as a whole. The Carvers of today need access to information to be fully empowered and included.

Similarly, the availability of affordable drugs also illustrates social justice aspects of inclusion and empowerment. If drug patents lead only to wealth for inventors and new drugs for the wealthy, the social justice principle of inclusion is violated. Empowerment and inclusion have broader implications as well: if drugs and other patents benefit only the patent holders and the wealthy few, the democratic constitutional purpose of advancing society in general—of advancing the general welfare—is frustrated. Such a path can cause average people to lose faith and respect for the patent system, leading to a demand for myopic curtailments inimical to long-term interests in promoting investment in innovation.

Attaining social justice in the achievement of intellectual property social utility need not be restricted to the interpretation and application of federal intellectual property law. For example, similar opportunities are frequently present in the application of the right of publicity, especially in the Digital Information Age. The right of publicity assures individuals

96. Id.
97. Id.
98. Id.
99. See Kenneth Quinn, Living History Interview with Ambassador, 17 TRANSNAT'L L. & CONTEMP. PROBS. 165, 168 (2008); Randall Robinson, What America Owes to Blacks and What Blacks Owe to Each Other, 6 BERKELEY J. AFR.-AM. L. & POL'Y REP. 1, 3 (2004) (George Washington Carver’s work is often trivialized; “the real value of his work lay in many complex and previously not understood areas of agricultural science,” not what he did with the peanut. “Carver was committed to finding ways to save and protect American agriculture, save and protect Caribbean agriculture, to save and protect global agriculture.”).
100. See generally Simone A. Rose, On Purple Pills, Stem Cells, and Other Marketing Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property, 48 HOW. L.J. 579 (advocating for “a limited compulsory licensing scheme which can be triggered for public health, national emergency, or market failure situations”).
101. Id.
102. See, e.g., Lateef Mtima, Achieving Social Justice Through the Right of Publicity 293, 296 (PLI Intell. Prop., Course Handbook Ser. No. 29016, 2011) (quoting ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 928 (6th Cir. 2003) (“The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity. [It] is a creature of state law and its violation gives rise to a cause of action for the commercial tort of unfair competition.”)).
the right to determine the instances under which others may utilize or exploit their personas and also the right to participate in the commercial benefits that might be derived from such uses. The right not only serves to protect individual privacy and personal dignity but also further provides incentive to individuals to invest effort and resources in the development and stylization of personal attributes and innovations and to pursue activities and accomplishments of public and popular interest, with the possibility of celebrity, public renown, and attendant commercial reward.

Analytically revisited, these social utility objectives can also be understood to encompass such pertinent remedial social justice goals as the eradication of negative racial and gender stereotypes and depictions, culturally offensive representations, and socially inequitable commercial exploitation, where individually recognizable personas are involved. Uses which result in depictions or representations which are not negative per se but which may be culturally offensive or sacrilegious might also be analytically accessible through right of publicity doctrine.

From an even broader policy perspective, the problem of inequitable commercial exploitation, particularly with respect to members of marginalized groups which have fewer entrepreneurial/access to wealth opportunities, presents an especially inviting target. Resourceful ingenuity and creativity exercised under challenging conditions often spur the development, refinement, and stylization of personal attributes and individual innovations, which sometimes engender enormous popular culture interest and concomitant commercial potential. However, institutionalized barriers to information, financial capital, and legal support often preclude commercial exploitation by marginalized innovators, while facilitating exploitation by majority enterprises and concerns. By invoking publicity rights to address such issues, socially equitable and progressive policies can be pursued and achieved through strategic invocation and application of right of publicity law and doctrine.103

lege of publishing his picture . . . . This right might be called a ‘right of publicity.’ . . . [M]any prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.

"Well known personalities . . . do not seek the ‘solitude and privacy’ which Brandeis and Warren sought to protect. . . . However, although the well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.

103. See, e.g., Mtima, supra note 102, at 299 (quoting J. Thomas McCarthy, The Human Persona as Commercial Property: The Right of Publicity, 19 COLUM.-VLA J.L. & ARTS 129, 141 (1995) (“Equity favors that plaintiffs benefit from the commercial exploitation of their personas. ‘T[he] right of publicity is not restricted to superstar, nationally known athletes and entertainers. It applies to everyone. For example, it applies to the long distance runner who won an Olympic medal twenty years ago, is now selling insurance in
Digital information technology provides many new ways in which to utilize and commercially exploit an individual's image, likeness, and personal attributes; thus, novel questions can arise not only regarding the extent to which individuals have the right to control and/or profit from such uses but also as to how these new technological uses might be reconciled with a variety of pertinent social justice and social utility issues. A social justice-cognizant assessment of the social utility goals which underlie the right of publicity, however, can provide a socially propitious (and strategically effective) methodology for resolving contemporary right of publicity disputes and balancing the constituent interests therein. The recognition of a functional interdependence between right of publicity social utility and right of publicity social justice offers a doctrinal basis for equitable social policies, progressive business models and even efficacious litigation strategies appropriate to the digital information age, and thereby enhances the benefits to be obtained through the pertinent new technological uses of the intellectual property rights involved.\textsuperscript{104} Thus, one key to effective IP enforcement is having laws of appropriate scope with appropriate exceptions and limitations that comport as much as practicable with people's expectations and conduct as well as with current and developing technology and changing business models.\textsuperscript{105} For society as a whole to commit to a system of intellectual property protection and rewards, people must perceive that system as a set of laws that serve some broader societal purpose—laws which serve their collective interest.\textsuperscript{106} Consequently, even where the legislature affirmatively undertakes to harmonize the relevant IP constituent interests, a socially productive balance—rights holder/user/societal stakeholder interests will be impossible to attain unless courts embrace and lawyers work to implement the overall social balancing scheme.\textsuperscript{107}

\textsuperscript{104} Thus, in digital and other contemporary rights of publicity disputes, courts would first consider whether there are any societal social utility or social justice interests that would be\textit{ advanced} by allowing an unauthorized use. In the absence of such interests or where such interests are limited or minimal, the court would proceed to weigh the relevant equities in deciding whether the unauthorized use should be allowed. Indeed, such a weighing of the equities is consistent with the Supreme Court's holding in \textit{eBay Inc. v. MercExchange, L.L.C.}, that the mere presence of intellectual property rights does not mandate injunctive relief. 547 U.S. 388, 393–94 (2006). Consequently a weighing of the social justice equities in many cases will not preclude an unauthorized use of an individual's persona but, rather, merely only assure her a portion of the revenues generated by the unauthorized use.

\textsuperscript{105} Jamar, \textit{supra} note 43, at 871–72.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

Iowa and whose name and accomplishments are printed today on a box of breakfast cereal to help sell the cereal. Who is more entitled to that commercial value? The former Olympian or the breakfast cereal conglomerate? ... Look at the recent cases involving well-known celebrities. How would you decide which party is most deserving and whether the award of damages distributed wealth “upwards”? Would you pick Samsung Electronics, a Korean electronics firm with $10 billion in annual sales as more deserving than letter turner Vanna White? Would you pick Frito-Lay, with $4.4 billion a year in sales and which is owned by Pepsi Cola, with $25 billion of sales a year, as more deserving of the marketing value of Tom Waits' voice than Tom Waits himself? I would not.’’\textsuperscript{104}).
By focusing upon the interdependence of intellectual property social utility and social justice, however, an institute can develop policies and strategies that promote symbiotic social justice/social utility mechanisms, such as encouraging broader stakeholder inclusion in the cause of intellectual property development and exploitation.108 Such inclusion fosters empowerment in the area of intellectual property and will result in concomitant socioeconomic advance not only of those newly included and empowered but of society in general as well.109 The application of intellectual property social justice/social utility interdependence theories provides a more palatable solution to the IP commoditization/social utility conundrum than one focused merely on maximizing exploitive rights of rights holders.110 This approach taps directly into the inherently democratic and decentralized features of digital information and other technological advances and emphasizes symbiotic mechanisms to promote both social utility and social justice.111

V. IP SOCIAL JUSTICE AND SOCIO-ECONOMIC EMPOWERMENT

An institute premised on a social justice perspective for the study of intellectual property also provides ecumenical benefits, which transcend the intellectual property field. New possibilities for participation in the creative/inventive process also present new opportunities for IP entrepreneurship and concomitant stakeholder interests in the IP regime, not only as users, licensees, and secondary beneficiaries but also as creators and drivers of the system and of the concomitant social advance and economic empowerment.112

One aspect of empowerment is economic empowerment and one path toward economic empowerment is entrepreneurship—a path which has long been trod for social uplift and advancement of marginalized groups.113 “Digital entrepreneurship” denotes the application of tradi-

108. Mtima, supra note 19, at 151.
109. Id.
110. Id.
111. Id.
112. Id.
113. See W. Sherman Rogers, The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations, 48 How. L.J. 1, 9, 57–58 (2004) (“Historical data reveals African American entrepreneurial activity at the incipient stages of the nation’s development in the 1600s. One historian determined that a conservative estimate of the collective wealth of the nearly 500,000 free African Americans on the eve of the Civil War was approximately $50 million.... The sociology of entrepreneurship examines the tendency of ethnic minorities to engage in business enterprise because of their exclusion from positions of political influence and subordination to a group of rulers. It is the sociology of self-help through entrepreneurial activities. [Max] Weber observed that national or religious minorities who are in a position of subordination to the ruling class are likely to be driven into economic activity because of their exclusion from positions of political influence.... [Edna] Bonacich’s research.... established that disfavored ethnic groups achieved economic security by playing the middleman position within the structure of capitalism. Middlemen occupations include positions such as labor contractors, rent collectors, money lenders, and brokers. As middlemen, they negotiate property transactions between pro-
tional entrepreneurial tenets and principles to the cause of economic empowerment through exploiting intellectual property in the digital context. Digital entrepreneurship thus affirmatively seizes upon the intellectual property law as an instrument for social change and economic advancement.

While many people may appreciate the entrepreneurial significance of small businesses, few consider the development of and exploitation of intellectual property as a means of socioeconomic advancement. While many artists may consider their talent as an avenue to fame and fortune, they are unlikely to appreciate the value of intellectual property ownership. By equipping artists and inventors with a working knowledge of intellectual property law, and just as importantly (if not more so), of the institutional means of exploiting intellectual property, the marginalized creator of intellectual property-related products and works is empowered to negotiate her way through the exploitation morass more effectively.

In addition to advancing [generic] social justice, Digital Entrepreneurship principles also encourage ardent respect for the copyright exclusive rights scheme and related property interests and incentives. This is so because fundamental entrepreneurial precepts favor the recognition of today’s “copyright entrepreneurs” as tomorrow’s “copyright vested gentry,” who will undoubtedly seek out and embrace the compensatory boons attendant to copyright ownership.

Too strong a copyright regime can prohibit or at least inhibit the creation of works that justly deserve to be exploited by the author of the often derivative work. But, at the same time, if copyright rights are limited too much, social justice principles of inclusion and empowerment can be harmed by exposing digital copyright authors, remixers, and entre-

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114. See Mtima, supra note 19, at 136–41.
115. Rogers, supra note 113, at 95–96 (“Black businesses, excluding insurance companies and banks, fell into four main categories by 1930: (1) amusement and recreational enterprises; (2) real estate businesses; (3) retail trade enterprises; and (4) businesses providing personal services. The largest number of successful black enterprises were those providing personal services, ‘restaurants, beauty parlors, barber shops and funeral parlors.’ . . . An overwhelming number of emerging black businesses which engage in providing some sort of personal service continue to be solely owned by the founder or his successor. In 1987, for example, sole proprietors owned 94.4% of all black firms. These figures are consistent with 1982 and 1977 statistics, which indicate that 95% and 94.3% of black-owned businesses were sole proprietorships in those years.”).
116. Mtima, supra note 19, at 142–43.
118. Mtima, supra note 19, at 142.
119. Id. at 145.
120. Id. at 101.
121. See Jamar, supra note 43, at 847.
preneurs to unjust exploitation by others of their works. With respect to African-Americans and other marginalized authors and artists, improper balancing of interests could merely renew the historical cycle of unjust exploitation. Digital entrepreneurship strategies must take care to align social empowerment and author incentive as mutually reinforcing as opposed to mutually exclusive, and thereby serve the interests of all stakeholders in the digital copyright community.

Consequently, a comprehensive weakening of copyright property rights may not be in the long term interests of the budding generation of digital entrepreneurs. Traditional entrepreneurial tenets contemplate long term as well as immediate socio-economic advance through the development, ownership, and commercial exploitation of individual resources. In the context of Digital Entrepreneurship, this necessarily entails preservation of the copyright entrepreneur's traditional exclusive rights.

The preservation of rights-holder property interests need not and probably should not be in exactly the same form as they are now or as they have been for the predigital world. Arguably, characterizing a two-second sampling of another's musical performance as an unlawful infringement in the Digital Age removes too much raw material from which to build the next works. Building blocks of works, such as letters, words, colors, shapes, columns and beams, individual dance steps, notes, chords, and rhythms have never been copyrightable. Analogous building blocks in the Digital Age should not be either.

IP social justice strategies can thus align social empowerment and author-inventor incentive as mutually reinforcing interests, as opposed to mutually exclusive objectives, and advance the interests of all constituents in the global IP community. Digital information technology and other new applications for the use and dissemination of intellectual property can therefore be exploited to their fullest to achieve the social utility objectives of the IP law and to fulfill the ultimate social justice promise of the IP regime.

Digital information technology therefore holds the

122. See Robert P. Merges, Copyright, Creativity, Catalogs: Locke Remixed ;), 40 U.C. DAVIS L. REV. 1259, 1262 (2007) ("I think remix culture has great potential. But I disagree about its implications for copyright. I do not think remix culture ought to force deep, fundamental, and permanent change in the structure of copyright law. First, I do not think such change is necessary; high enforcement costs and market competition will neutralize much of the potential for copyright law to bog down remix culture. Second, it would not be fair to the people who create original mass market content for remixers to ‘redistribute’ too much of the money creators earn from their work.").

123. See Mtima, supra note 19, at 146–47.

124. Id.

125. Id. at 145.

126. See id. at 146.

127. Id. at 145–46.

128. See id. at 147–51.


130. See Jon R. Cavicchi & Stanley P. Kowalski, IP in Developing Nations: Use the Kitchen Door, NAT'L L.J., Dec. 10, 2007, at 23 ("IP in the public interest is increasingly a global concern. IP capacity fosters invention and drives innovation, raising standards of living and promoting sustainable economic development. The result is an engine, wherein
promise for the democratization of access to information and knowledge and inclusive participation in the creative and inventive process, engaging more people both as authors and inventors and as passive users of intellectual property.\textsuperscript{131}

A wisely structured intellectual property regime not only protects IP but also allows, protects, and encourages appropriate sorts of transformative uses, which in turn create new opportunities for previously marginalized groups to express themselves creatively and otherwise to profit from participation in the IP system. An appropriately grounded law school intellectual property institute advances these goals.

VI. LAW SCHOOL IP INSTITUTES: FOUNDATIONAL PRINCIPLES OF IP SOCIAL UTILITY/SOCIAL JUSTICE

Considering the role of social utility and social justice in law school curriculum and its foundational role in the development, pedagogy, and practice of intellectual property law, its function in law school institutes becomes concrete. Many law schools today embrace these tenets in the establishment of their IP institutes.

For example, Duke University School of Law has an IP program,\textsuperscript{132} within which it has created two centers, one focused on the public domain\textsuperscript{133} and the other on ethics and policy issues concerning genetics.\textsuperscript{134} Each center has its own mission and focus and the overall IP program has the following statement of its purpose and perspective:

The second defining quality of Duke's approach to intellectual property is that it goes beyond the merely technical or technocratic. In an information society, intellectual property law presents fundamental questions of politics and policy; what is the correct balance between the public domain and intellectual property, or between intellectual property rights and free speech? Gene patents, Napster-like peer-to-peer file sharing, fair use and parody, the role of private investment in scientific research and innovation—such issues present complex questions of morality, economic effect, constitutionality and competitiveness. Both in class, and through a variety of scholarly, practical and law reform activities, Duke Law School's Intellectual Property Program explores these policy questions, engaging in public service and helping to prepare its graduates to shape the ground rules of the information society, whether as lawyers, entrepreneurs,
American University's law school, the Washington College of Law, has the Program on Information Justice and Intellectual Property (PIJIP). PIJIP describes its mission as including "[h]elping to describe and promote the public interest in information law and policy through research, publications, public events, advocacy, and the provision of legal services." The International Technology Transfer Institute (ITTI) at University of New Hampshire School of Law, Franklin Pierce Center for Intellectual Property follows similar precepts. The ITTI is dedicated to promoting commercialization of science, technology, and innovation in developing economies such as Zimbabwe, Colombia, Vietnam, and emerging high-technology nations across the globe such as Argentina, India, and China. ITTI implements this mission by building capacity in intellectual property management, technology transfer, and information access in research institutions (e.g., university, government, international). Such capabilities are essential for moving research from basic innovation to commercialized products having broad societal benefit, such as vaccines, medicines, and agricultural technologies.

The critical link between basic research and commercial application of innovation are technology transfer offices (TTOs). To actually contemplate and then implement programs to build and/or strengthen technology transfer requires focused and strategic capacity building, including political and governmental support, education of staff, integration of technology transfer mechanisms into the institutional structure(s), establishment of international professional networks, and access to advanced information resources (patent, legal, and scientific databases) that are increasingly vital in the knowledge-based economies of the 21st century. Long-term nurturing of technology transfer will require integrated and sophisticated programs that will likely continue for years with many opportunities for education, networking, scholarship, and professional de-

135. Program in Intellectual Property, supra note 132.
140. International Technology Transfer Institute, supra note 138.
141. Id.
development. ITTI is working in this area to strategically implement international development programs that have sustainable and significant impact.

George Washington University Law School has a very large and comprehensive program in the intellectual property area.\textsuperscript{143} Part of that program is the Dean Dinwoodey Center for Intellectual Property Studies, which describes its functions as including sponsoring “research and activities on a broad range of intellectual property issues” that focus “on both international and domestic issues.”\textsuperscript{144}

The Center for Law & Innovation at the University of Maine School of Law oversees the Maine Patent Program, which offers independent inventors and entrepreneurs information and advice on patent law.\textsuperscript{145} Inventors disclose their inventions to the Program, where students in the law school’s Intellectual Property Clinic conduct a prior art search and work with a patent attorney to prepare a patentability opinion.\textsuperscript{146} In some cases, the students and attorneys prepare and file provisional patents on behalf of the inventors.\textsuperscript{147} The Program and IP Clinic also work with individuals and start-up companies seeking assistance with trademark or copyright protection.\textsuperscript{148} Through public seminars and one-on-one counseling, the students and clinical faculty help educate members of the public on intellectual property law, providing them not just an opportunity to learn but an opportunity to prosper.\textsuperscript{149}

VII. THE INSTITUTE FOR INTELLECTUAL PROPERTY AND SOCIAL JUSTICE AT THE HOWARD UNIVERSITY SCHOOL OF LAW: PLACING IP SOCIAL JUSTICE AT THE PEDAGOGICAL FOREFRONT

As is disclosed in its name, social justice is the driving social utility principle of the IIPSJ program at the Howard University School of Law.\textsuperscript{150} Since its founding in 2002, IIPSJ has addressed the social justice implications of intellectual property law and practice both domestically and globally.\textsuperscript{151} IIPSJ’s work ranges broadly and includes scholarly ex-
amination of intellectual property law from the social justice perspective;\textsuperscript{152} advocacy for social-justice aware interpretation, application, and revision of intellectual property law; efforts to increase the diversity of the those who practice IP law; and programs to empower historically and currently disadvantaged and under-included groups to exploit IP effectively. IIPSJ has sponsored scholarship,\textsuperscript{153} conducted conferences, and engaged attorneys and policy makers at all levels—private, corporate, public, and judiciary—in discussions concerning the social justice implications of intellectual property.\textsuperscript{154}

The social justice approach to intellectual property issues not only assures faithfulness to the constitutional mandate but also helps to produce practitioners and scholars capable of implementing the constitutional directive of reinventing the law to apply it effectively to new challenges.\textsuperscript{155} In short, IIPSJ, through its social justice perspective, seeks nothing less than to produce legal social engineers to structure and employ a democratic rule of law in the intellectual property area toward the greater societal good.

Within the broad set of concepts captured by the phrase “social justice,” IIPSJ focuses on inclusion and empowerment, particularly the inclusion of groups historically and currently excluded from full participation in the fruits of the intellectual property regime.\textsuperscript{156} All of IIPSJ’s activities to date and those in various stages of planning and implementation for the future are intimately tied to advancing social justice.

IIPSJ’s programs advance inclusion and empowerment by providing exposure for minority IP practitioners and scholars and drawing attention to the need for and opportunities to advance diversity in the field of IP law practice.\textsuperscript{157} A major vehicle for IIPSJ’s work has been planning and hosting an annual conference around the theme of social justice and intellectual property.\textsuperscript{158} This conference includes speakers and attendees from academia, private practice, governmental policy making positions, the judiciary, and in-house counsel from technology-driven corporations.\textsuperscript{159} Perhaps its most significant contribution, however, is the intertwining of social justice perspectives with cutting-edge developments in the law, and the program’s resulting eligibility for continuing legal education accreditation, making it professionally pragmatic for practicing attor-
Without the social justice focus, however, the conference would be just another IP update and networking conference, or an academic seminar on hot doctrinal issues in the field of IP. Those sorts of conferences are valuable in their own right but do not typically address issues of diversity, inclusion, and empowerment and do not critically examine the IP doctrine from a social justice perspective.

IIPSJ also advocates for social justice through scholarly publications, testimony at legislative and judicial hearings, and commentary on governmental initiatives. The social justice perspective has informed scholarly work by the IIPSJ principals, ranging from a relatively abstract discussion of the implications of the landmark civil rights decision in *Brown v. Board of Education* for intellectual property and a foundational piece articulating the social justice mandate in the Constitution's Intellectual Property Clause to very concrete evaluations of particular parts of the IP regime, including digitizing text and a discussion of the Google Books project settlement agreement and the derivative work right in the social networking context.

IIPSJ's advocacy further extends beyond practitioner education and the academic environment (including both professional mentoring and scholarship) to taking positions on IP-related matters of significant public importance. For example, at the Google Books Project Settlement Hearing, being the first to give testimony during the proceeding, IIPSJ utilized the opportunity to set the tone for the hearing with the twenty-five other speakers having to acknowledge the social justice aspects of the settlement in their own remarks, including those speakers opposing the settlement:

In drafting the Copyright Clause, our Constitution's Framers penned a broad directive of social utility, one amenable not only to legislative and judicial interpretation and application, but also to private initiative and adaptation to the changing realities of an evolving national culture. The proliferation of personal computers and computer software programs, and the concomitant rise of the Internet created a socio-intellectual barrier dividing those who have had access to the brave new world from those who have not. The Google Book Project and the proposed Settlement Agreement have redirected attention in contemporary copyright protection to the necessary balance between the social utility and social justice ends of copyright and the protection of copyright property rights as a means to serve those ends. The Google Book Project as effectuated by the Settlement Agreement positively affects social justice by equalizing

160. *Id.*
161. About IIPSJ, supra note 150.
162. See Jamar, supra note 4, at 629–57.
163. See Mtima, supra note 19, at 119 n.52.
164. See generally Mtima & Jamar, supra note 43; Jamar, supra note 43.
165. See generally Jamar, supra note 43.
access to information; this opportunity should not be missed.\textsuperscript{167}

IIPSJ has also advocated that United States government enforcement of IP rights take into account not only the rights of IP rights holders but also of others, especially the under-included and marginalized. In its submission to the IP Enforcement Coordinator, IIPSJ advocated for three core principles:

1. IP enforcement policies should preserve author/inventor incentive mechanisms without stunting widespread and socially beneficial use and exploitation of intellectual property.
2. Intellectual property protection is to be an engine of cultural and economic development, not a brake upon them.
3. A progressive, effective enforcement policy must anticipate future needs and opportunities.\textsuperscript{168}

IIPSJ continues to take formal positions on IP policy issues, perennially emphasizing the social justice aspects of inclusion and empowerment. These initiatives have not been without impact, as various other scholars, practitioners, and policymakers have also begun to highlight the need for a social justice emphasis in the interpretation and application of the intellectual property law.\textsuperscript{169}

Most recently, Under Secretary of Commerce and USPTO Director David J. Kappos delivered remarks at the IIPSJ Seventh Annual Intellectual Property and Diversity CLE Conference in March of 2010, where he discussed the importance of balance and of considering the needs of the marginalized and underserved from an intellectual property and social justice perspective.\textsuperscript{170} Recognizing the need for a new global vision of intellectual property social justice, the Under Secretary centered his remarks around the need to address indigenous cultural groups and innovation, a topic typically regarded as outside the intellectual property regime:

I am going to speak about an Intellectual Property related topic that does not get a lot of attention here in the US, but should: traditional knowledge. I’ll also touch on some topics that do, deservedly get considerable attention: competition and copyright law.

Let’s start by considering why anyone should care about IP—outside of IP circles. Why is IP coming into contact with social jus-


\textsuperscript{169} See generally Chander & Sunder, supra note 43; Mtima, supra note 19 (Intellectual Property).

As we move into the second decade of the 21st Century, it has become increasingly clear that innovation is a principal driver of our economy and an engine of social advancement. It is also the only sustainable source of competitive advantage for world economies. And since intellectual property is the vehicle that facilitates the delivery of innovation to market, it follows that inventors who use IP effectively will flourish. It also follows that IP plays a crucial role in advancing social justice. And, the distance between idea and marketplace is shrinking. Said another way, innovation is moving more quickly from creation to manufacture. This trend is irreversible. The result is that IP is the vessel that captures value as an idea moves to marketplace.

Take the critical balance we're working to strike in the area of traditional knowledge, traditional cultural expression, folklore, and genetic resources (TKGR). In today's knowledge-based economies, many are looking toward traditional knowledge and traditional cultural expressions as a source of revenue. At the same time, with the emergence of modern bio-tech, genetic resources have assumed a greater economic potential and scientific value to a wide range of stakeholders.

We, as an IP community, are wrestling with the challenge of ensuring against misappropriation and misuse of traditional knowledge and traditional cultural expressions/folklore. At the same time, we must pursue sound IP policy, to wit: maximum dissemination of knowledge encourages creativity, helps to preserve, develop and maintain knowledge, and creates value throughout society. In addition, we need to consider the social costs and benefits of recognizing a new right to exclude others from using certain information or resources.

As we move toward solutions for TKGR issues, we must endeavor to strike the proper social balance that ensures life-saving medicines reach the hands that need them, while ensuring the people and culture responsible for their discovery are not exploited. So, it is clear that Intellectual Property and the need for IP protection is expanding. As this happens, IP will continue to bump up against new and different areas of the law.\footnote{Id. at 1–4.}

Moreover, Under Secretary Kappos did not limit his emphasis upon socially productive interpretation and application of the intellectual property law to innovation currently beyond traditional intellectual property protection. In addition to acknowledging the need to bring TKGR within the IP regime, he also noted the social utility impact that said regimes can have upon competition and innovation:

Patents and competition share the overall purpose of promoting innovation. In order to achieve their complimentary goals, they must be carefully calibrated. For purposes of promoting innovation based on competition, the existing patent regime can be a double-edged sword. On the positive side, high-quality patents provide an
incentive to invent and to disclose inventive results. Conversely, the prospect of large numbers of issued or pending patents with ambiguous boundaries reading on a new product can pose barriers to innovation.\footnote{172}

Thus, social utility remains the fulcrum of a properly balanced system of intellectual property protection.

Perhaps most apt to the issue of contemporary IP social utility, however, is the Under Secretary's application of a social justice perspective to the novel challenges of the digital information age:

Of course, any Internet 3.0 strategy requires that attention be paid to several areas. It requires developing technology that prevents illegal content from flowing on the Internet. It requires the aggressive prosecution and punishment of egregious, professional infringers.

\textit{It also requires looking at IP protection as a balance that makes appropriate exceptions and exemptions where called for.} Improving copyright exceptions and establishing and enforcing strong intellectual property rights are complementary rather than contradictory tasks. Improving exceptions and limitations for blind, visually impaired, and print-disabled persons is a question of both legal and moral urgency for the international IP community as it is here in the States.

I began this morning by saying that IP is the currency of innovation. In contemplating the nexus between Intellectual Property and social justice, I'm struck by the opportunity IP, as currency, can provide: it can ensure that information reaches the hands of all Americans—and people throughout the world. But the responsibility is ours. Whether it's a young poet on U Street or an engineer in his garage in Oakland, CA, it is our responsibility to educate Americans on IP, and on the innovation future of our country.\footnote{173}

As the quotations from Under Secretary Kappos’ speech make clear, social justice concepts provide an effective set of neutral principles from which to assess intellectual property law and the intellectual property regime, in order to balance the protection of rights of creators of intellectual property with those of society in general and of particular users, especially those who have historically not been included and empowered through intellectual property.\footnote{174} That is the precise business of the IIPSJ.

\footnote{172. \textit{Id.} at 4-5.}

\footnote{173. \textit{Id.} at 6-7 (emphasis added).}

\footnote{174. See Cavicchi & Kowalski, \textit{supra} note 130, at 23 (“Developing countries are facing a cycle of converging pressures: loss of arable land, depletion of natural resources, relentless industrialization, sprawling urbanization and rapid population growth. Providing for adequate health and nutrition will remain a challenge well into this century. Not surprisingly, to address these issues, developing countries are increasingly considering innovative advances in biotechnology. Yet cutting-edge biotechnologies, predominantly owned by entities from industrialized nations, invariably engender IP constraints that complicate access. In developing countries, inadequate capacity in IP management inhibits international technology transfer, stymies domestic innovation and impedes access to lifesaving technologies. By building and strengthening human and institutional capacity in IP management, developing countries can overcome many of these obstacles. Increased capacity will facilitate...”)}
The social justice perspective of inclusion and empowerment that drives IIPSJ's work is critically important as a corrective to a more narrow focus on expansion and enforcement of the rights of IP rights owners. This social justice perspective is not pulled from thin air. It comes from the foundational laws of intellectual property in the United States itself. The Constitution authorizes Congress to make patent and copyright laws “to promote the progress of science and useful arts” for the benefit of everyone—not just a few.\textsuperscript{175} It is society’s benefit that matters; the limited rights granted to exploit the works created and inventions made are the means to the end. Under Secretary Kappos provides a poignant example of how these means can concretely advance social utility ends when fueled with a social justice impetus:

So let me conclude . . . with a short story. A true story. A few months ago I had the opportunity to award the 600,000th Design Patent. The award marks a significant milestone for both the USPTO and the inventor community. The design patent chosen for the ceremony represented a wonderful invention—the “go-be solar charger.” The charger is pretty cool—it is a briefcase-sized solar panel that produces energy which can be used to charge a wide range of electronic devices. But it wasn’t just the invention that stuck with me. It was the story of the person behind the machine. Mr. Robert Workmen may not have known it, but for a moment, he personified the future of IP: a balance of innovative thinking and IP protection with an emphasis on the moral imperative of helping others. Mr. Workmen had the idea for the “go-be solar charger” while doing aid work in the Democratic Republic of the Congo; where the constant power shortages frustrated his teams’ ability to be productive. Mr. Workmen’s idea—and the company Mr. Workmen has built around it—are now responsible for 900 jobs right here in the United States. Importantly, his invention provides a low cost solution to power shortages in Africa and around the world. His story—and stories like his—demonstrate the potential of IP in maximizing tech diffusion international development partnerships and encourage increased international technology transfer of proprietary health and agricultural biotechnologies. Equitable access to critical biotechnological innovations will improve basic health and nutrition, especially among the poor of developing countries, disproportionately represented by women and children . . . .

Strengthened human and institutional IP capacity in developing countries will also drive domestic innovation, generating products and processes that address the specific needs of the country and region. The connection between IP innovation and technological progress is fundamental; IP management capability is interwoven into the innovation framework, providing incentives, protecting innovative endeavors, providing a shelter for development and fostering a platform for commercialization and market entry . . . . If ignored, the innovative assets of developing countries will remain disorganized, haphazardly managed and chronically underutilized, to the detriment of the public good.”); see also Christine Haight Farley, Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, 30 Conn. L. Rev. 1, 2–4 (1997).

\textsuperscript{175} U.S. Const. art. I, § 8, cl. 8 (“Congress shall have power . . . [to] promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to authors . . . the exclusive [r]ight to their respective [w]ritings . . . .”).
and opportunity toward improving social justice.\textsuperscript{176}

Properly understood, using a social justice perspective to examine intellectual property law is not only appropriate but demanded: it engenders an IP regime that induces the creation of innovative and expressive works not primarily toward the enrichment or benefit of a select few but for the betterment of society as a whole.

\textsuperscript{176} Kappos, \textit{supra} note 170, at 9.