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## IP Law Book Review, Vol. 6#1, March 2016

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# The IP Law Book Review

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**THE EUREKA MYTH: CREATORS,  
INNOVATORS, AND EVERYDAY  
INTELLECTUAL PROPERTY**, by Jessica Silbey

Reviewed by Tina Piper, McGill University Faculty  
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**INNOVATION & INTELLECTUAL PROPERTY  
– COLLABORATIVE DYNAMICS IN AFRICA**,  
by Jeremy de Beer, Chris Armstrong, Chidi  
Oguamanam, and Tobias Schonwetter

Reviewed by Joseph F. Turcotte, York University

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# The IP Law Book Review

IP Law Center, Golden Gate University School of Law

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**INNOVATION & INTELLECTUAL PROPERTY - COLLABORATIVE DYNAMICS IN AFRICA**, by **Jeremy de Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter**. University of Cape Town Press, 2014. 408 pp. Softcover \$45.00

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The ambitious volume **INNOVATION & INTELLECTUAL PROPERTY** is edited by members of the Open African Innovation and Research Training Project (Open A.I.R. Project) who are law professors and researchers based in Canada and South Africa. The Open A.I.R. Project is a “pan-African and globally interconnected research and training network” (p. v) focused on raising awareness about Intellectual Property (IP) in African settings, empowering an IP-oriented community in Africa, and identifying and analyzing IP-related problems and opportunities for collaboration and innovation. This volume and its sister report, **KNOWLEDGE AND INNOVATION IN AFRICA**<sup>1</sup>, as well as the Open A.I.R. Project more generally will be of interest to IP scholars, practitioners, and policy-makers interested in the role IP and alternative knowledge management practices can play to facilitate collaborative innovation in Africa, other developing state contexts, and the evolving knowledge-based economy.

The volume includes sixteen chapters written by the editors and an interdisciplinary array of contributors who responded to a call for papers seeking to answer: “How can existing or potential IP systems be harnessed to appropriately value and facilitate innovations and creativity for open development in Africa?” (p. 4). Reflecting the diversity and geographic size of the African continent, the resultant chapters cover 9 countries spanning the four primary regions of the African continent. The majority of chapters are based on case studies of particular countries, formal and informal economic industries or arrangements, and specific IP-related issues with respect to emerging areas of innovative and creative activity. To various degrees, each chapter employs domestic and international legal and doctrinal analysis as well as other research methodologies from the social sciences, including quantitative and qualitative data analysis based on interviews and surveys. Collectively, these case studies offer detailed insights into the ways in which IP law facilitates or discourages innovation and creativity in particular socio-economic and geographic contexts.

In Chapter 1, De Beer, Oguamanam, and Schonwetter introduce the impetus for the edited volume within the broader objectives of the Open A.I.R. Project. The authors frame the case studies to address the transnational legal and governance environment and the polarized opinions surrounding IP's impact on economic growth and development. The chapter does not focus on this polarization and, instead, situates the volume in relation to emerging narratives about the role and efficacy of IP law in development-oriented contexts and with respect to concerns over access to knowledge. Within this framing, the focus becomes whether or not the prevailing transnational IP regime is undervaluing or undermining African innovation and creativity—or some combination of both. Chapter 1 draws a distinction between “innovation” and “creativity” while also highlighting the similarities of the two terms as “twin ideas” (p. 10). Specifically, “innovation” is described as creating new products, services, or business practices for economic and industrial potential; “creativity” is described in a more holistic way, which recognizes non-market and socio-cultural oriented developments—concepts De Beer, Sowa, and Holman further elaborate in Chapter 2. The distinction between “innovation” and “creativity” is important for highlighting how creative activities and knowledge-based resources more generally are *necessary for* but not necessarily *constitutive of* market-oriented exchange and economic growth. By framing innovation and creativity as twin ideas, Chapter 1 illuminates how rigid adherence to individualized forms of IP law may inhibit socially desirable activities at the service of economically oriented calculations, which can serve to foreclose subsequent and beneficial innovative or creative activities. For example, the authors foreground the idea of “open development” (p. 8) as an alternative to the “closed” proprietary mechanisms largely perpetuated by dominant understandings of IP. Attention to “open” forms of development allows both the macro-level IP public policies and micro-level IP management practices of states, communities, individuals, and businesses in formal and informal activities to be unpacked and analyzed according to how they contribute to or detract from socially and economically desirable outcomes. Following Chapter 2, which further theorizes many of the arguments presented in Chapter 1, the remaining case study-based chapters are grouped into roughly six interconnected thematic areas: 1) informal appropriation; 2) trademarks and geographic indications; 3) traditional knowledge (TK); 4) copyright; 5) patents; and, 6) publicly funded research (pp. 13-14). These groupings demonstrate how existing or potential forms of IP are best suited to meeting the economic and socio-cultural needs of the heterogeneous array of actors in Africa.

Chapters 2 and 3 demonstrate how informal knowledge management practices can be conceptualized within the informal economy in Africa and how these relate to other scholarly literature focused on entrepreneurship, innovation, and creativity. In Chapter 2, De Beer, Sowa, and Holman extend some of the arguments and theorizations presented in Chapter 1, focusing on how the operations of the informal economy in Africa can be linked to IP-based paradigms. In doing so, they present a more holistic framework for development through IP, which takes into account the possibility of enhancing the capabilities necessary for development by furthering political, economic, and social rights by recognizing and facilitating the innovative and creative acts taking place in informal economies. In Chapter 3, Kawooya helps to ground the previous chapter's discussion by examining formal and informal

economic interactions in the automotive sector of Kampala, Uganda. Kawooya's research discovers that artisans and actors in the informal sector are central to the innovative outputs of formal activities but are more incentivized by concerns over sharing and the dissemination of knowledge than the economic incentives deemed critical by prevailing IP theories.

The next two chapters examine how trademarks and geographic indication (GI) titles can be used as a form of collaborative branding to distinguish and characterize conditions of origin and local specificity. In Chapter 4, Oguamanam and Dagne focus on Ethiopian coffee and Ghanaian cocoa industries and the use of GIs to facilitate open development. The authors find that the benefits accrued from branding products based on their place-based origins must be considered in light of the economic costs and social efforts necessary for establishing a GI-based management regime. Such regimes offer export and development oriented opportunities, while entailing considerable economic expenditures and social reorganizations necessary for maximizing commodity production. The authors find that these burdens can be mitigated due to existing capacities in the countries and by implementing GI strategies in coordination with the practices and institutional settings of local producers already amenable to open and collaborative forms of production. Adewopo, Chuma-Okoro, and Oyewunmi focus on the possible applicability of communal trademarks for Nigerian leather and textile products. In Chapter 5, the authors study the existing legal and industry environments in Nigeria and determine that small-scale producers of leather and textile goods are challenged by market access problems, which detracts from their economic performance. They conclude that communal trademarks (such as GIs) are useful tools for product differentiation and can be implemented and deployed to increase market access opportunities. Both Chapters 5 and 6 demonstrate how community-oriented forms of product differentiation and knowledge management are used to generate locally specific forms of socio-economic growth and development.

Similarly, Chapters 6 and 7 explore the idea of a "traditional knowledge commons" as a means of facilitating open forms of knowledge exchange and collaboration, while also protecting the valuable knowledge-based resources of local and traditional communities from external misappropriation. In Chapter 6, Ouma examines the policy context for adopting a commons-based approach to TK management in Kenya. Ouma finds that the existing legal system has the necessary elements to support a legal and policy framework for a TK commons and that earlier efforts to create a digital archive of Maasai knowledge provide the basis for supporting related TK commons initiatives. However, the Kenyan legal system and the earlier digital archive initiatives focus primarily on conventional forms of IP protection and will need to be re-oriented to adhere with TK concerns. Training and capacity building with respect to TK commons will be critical for such efforts. The idea of a legal "trust" for TK healers in South Africa is considered in Chapter 7. Cocchiaro, Lorenzen, Maister, and Rutert argue that the creation of a "trust" with TK healers acting as the trust's beneficiaries will improve the protection, sharing, and benefit from IP-related TK by allowing the healers to manage a TK-based commons based on access and benefit sharing as well as prior informed consent. These chapters provide examples of how the construction and maintenance of a

“TK commons” can be beneficial for furthering creative endeavors and enabling innovative activities.

The protection, construction, and maintenance of knowledge-based resources via copyright are examined in the next two chapters. In Chapter 8, Rizk examines the extent to which the independent music industry in Egypt has “commons like” characteristics. The chapter is based on research from surveys and interviews with stakeholders in the sector, including musicians and consumers. Rizk finds that the Egyptian independent music industry contains diverse and dynamic attitudes about copyright and the sharing of musical outputs; business models based on a “digital commons” modeled off of Creative Commons efforts could be useful for promoting continued access to musical resources while providing financial benefits to producers by compensating collaborators for their creativity. Open access (OA) scholarship in Kenya is similarly examined for its potential for rewarding creators while promoting open development, in Chapter 9. Sihanya finds that authors are open to alternative publishing formats as a means of enhancing the reach of their scholarly work in order to bolster their academic reputations as well as a reticence to embracing OA due to the loss of economic rights and possibilities afforded by copyright. Sihanya concludes the chapter by recommending two broad changes to reform the Copyright Act of 2001 and strengthen copyright administration and procedures, as well as seven specific recommendations for promoting a progressive role for copyright and OA in Kenya.

Chapters 10, 11, and 12 examine the applicability of patent law in a similar way. In Chapter 10, Mgbeoji presents the results of a survey of patent stakeholders in 44 countries regarding the capacity of African patent offices. This research finds that most of the national patent offices were ill-equipped to examine patent applications and coordinate patent information in an easily and publicly available manner. Based on this under-capacity, the ability of African patent offices to facilitate the dissemination of information regarding patented products and processes hampers “open development” attempts as well as institutionalized forms of technology and innovation diffusion via the transnational IP regime. Dos Santos and Pelembe’s research in Chapter 11 examines small-scale, locally driven biofuel production in Mozambique, which relies on non-patented first generation technology available through the public domain. The authors find that current production activities are not directly impacted by patent law, however, future efforts to develop second generation technologies and local capacities will require government support and investment to promote accessible licensing agreements necessary for gaining access to emerging technologies; Mgbeoji’s research further suggests that similar action will be necessary to improve the capacity of patent offices to ensure the accessibility of relevant information. In Chapter 12, Awad and Abou Zeid focus on the biofuel sector in Egypt and find that only one domestically generated patent for biofuel technologies exists, as of 2012. The authors conclude that government support for policy mechanisms and information resources are needed to expand access to knowledge regarding “clean energy” technologies, which can help to spur advances in this field in Egypt. Specifically, Awad and Abou Zeid argue in favour of fast-tracked examination of clean technology related patents, and that the Egyptian Patent Office expedite its plans for the creation of an advanced patent database. They also argue that stakeholders consider the development of a “patent

commons” based on open source approaches for maximizing the sharing of information in order to promote collaborate forms of innovation. The three chapters on patents and the local capabilities of governmental and industrial actors to access information regarding innovative technologies demonstrate how foreign models of IP protection and administration run into difficulties when applied in developing contexts and how these problems can be mitigated through “open development” initiatives.

The final section of the volume explores the interactions between IP law and the ownership of knowledge and information derived from publicly funded research. As demonstrated in the previous section on patents, IP regimes designed for different local circumstances can negatively impact the dissemination and accessibility of publicly funded innovation and creativity. In Chapter 13, Ncube, Abrahams, and Akinsanmi focus on the University of Cape Town (UCT) and the University of the Witwatersrand (Wits) to examine how commercially driven IP and knowledge management guidelines impact the creation and dissemination of knowledge and information at these universities. The authors find that both UCT and Wits have been active in implementing new provisions of South African legislation focused on leveraging publicly funded research for commercial purposes. These efforts have resulted in a transition from purely research-oriented work towards more “mixed research and innovation orientation” (p. 308). This transition can be harnessed for development oriented purposes by ensuring that universities do not merely adopt a “compliance perspective” focused solely on increasing the number of patents that are attained by university researchers; instead, the authors argue that UCT and Wit, and universities in general, should take into account the development considerations engrained in legislative and policy frameworks created to promote innovation and creativity through publicly funded research. Belete’s research in Chapter 14 focuses on the intentions of Ethiopia’s innovation policy framework and the on-the-ground realities encountered by researchers in the country. The chapter finds that the state’s focus on IP promotion overlooks the lack of human resources and infrastructure necessary to generate innovative and creative research. Ethiopian universities are, therefore, playing only a limited role in the generation of innovative research and the adaptation of foreign technologies for industry-related purposes. Scarce resources for university level research may, therefore, be better used to increase the capacity of the research sector to produce innovative and creative outputs while employing alternative, collaborative IP and knowledge management regimes for maximizing commercial possibilities. Ama’s research into publicly funded researchers in Botswana (Chapter 15) surveys the perceptions of these researchers towards IP policy frameworks as well as concerns regarding “open science” principles. This research finds that there is a lack of knowledge amongst researchers about the prevailing institutional, legal, and policy frameworks governing IP in Botswana and a commitment to leveraging publicly funded research through openness and the sharing of information. Chapter 15, as well as the chapters by Ncube *et al* and Belete in this section, helps to highlight the disconnect between institutional and national level policy objectives and frameworks based on IP-maximization efforts emanating from abroad and the local realities faced by individuals, communities, universities, and stakeholders working to create and disseminate innovative and creative research in local circumstances.

INNOVATION AND INTELLECTUAL PROPERTY concludes with a chapter co-authored by the editors, which draws conclusions based on the various case studies described above. De Beer *et al* are careful not to generalize from the diverse and specific research contained in the volume and, instead, work to identify the commonalities found within the cross-cutting and interconnected themes that the chapters have been grouped into and with respect to the volume's focus on "collaborative innovation and creativity", "openness", and "IP". The editors also include a section of instructive recommendations for African policy-makers to "avoid mistakes", "broaden IP conceptions", and "look forward." These recommendations are based on implementing "evidence-based rather than political decisions wherever possible" (p. 392). Given the vast array of countries, regions, industries, economic sectors, and ideas presented in the volume, this is sage and necessary advice for African policy-makers, IP focused policy-makers more generally as well as scholars and practitioners interested in the limits and possibilities of existing and possible IP and knowledge management regimes.

#### ENDNOTES

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<sup>1</sup> Shirin Elahi and Jeremy de Beer with Dick Kawooya, Chidi Oguamanam, Nagla Rizk and the Open A.I.R. Network, KNOWLEDGE AND INNOVATION IN AFRICA: SCENARIOS FOR THE FUTURE (The Open A.I.R. Project, 2013).

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# The IP Law Book Review

IP Law Center, Golden Gate University School of Law

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**THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY**, by **Jessica Silbey**. Stanford University Press, 2015. 356 pp. Softcover, \$25.95, Hardcover, \$85.00

Reviewed By Tina Piper  
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Silbey's book is a masterful analysis of the results of four years of fifty face-to-face interviews with scientists, engineers, musicians and artists, their business associates and intellectual property (IP) lawyers. Rather than use the normative categories of IP law to organize the insights gleaned from the interviews, Silbey uses a more emergent methodology that allows the results of the interview to organize the themes of the book. The book takes us on a journey through the creative process, making the links to black letter law where appropriate without making chirographic law the core of the analysis. Each chapter, however, is carefully crafted to address some of the justifications that motivate changes in IP laws or policy. A good example is the first chapter, "Inspired Beginnings," which adds depth and weight to the story of why people initially create and innovate. This is a core question for policy makers as one of the perceived justifications for IP laws is that they inspire creation. In fact, as Silbey shows, the creation story is much more complicated and personal and barely (if at all) inspired by IP. Silbey's relational account paints a more realistic picture of the multiple influences on the individual that lead to creation, in particular supportive community relationships and intellectual debts to others in their field. Refreshingly, Silbey recounts that creators often play and have fun while making their IP-worthy artifacts, a part of the story rarely present in simpler, starker utilitarian accounts of the creation of IP artifacts destined for markets.

Silbey moves from inspired beginnings to consider what motivates creative and innovative work on a day-to-day basis. She finds that all sorts of things keep people working but it is rarely the promise of IP on the final product. In fact, IP development was often "considered a nuisance" by her respondents and a more marginal component of their business development plans (p. 61). Silbey recounts how, for many of her interviewees, it was simply that their work was integral to their professional identity and was unlikely to diminish lest that identity also be lost. The innovators and creators she interviewed seemed more interested in controlling the conditions of their work than its outcomes. That control was the best measure of their success. Further, under-enforcing their IP, i.e. giving away artifacts for free to build market share, was an essential strategy for many.

Significantly, the interviews showed how important the freedom to work and to influence the world were to the creators compared to the importance of the work product itself (which IP law tends to focus on). In many ways, interviewees felt that IP law did not adequately protect this freedom to work, particularly as regards relationship-building or autonomy. It speaks to the power of what she heard that Silbey does not hesitate to say at the end of the chapter that her results undermine the explanatory power of the utilitarian justification for IP which for so long has explained IP and justified its legal expansion.

In Chapter 4, Silbey gets to the heart of what many creators and innovators want, which is protection of their reputation, a role for which IP is poorly suited. From the interviews, Silbey points out that this misalignment may have something to do with the fact that reputation “feels deeply personal, [but] its lifeblood requires public circulation and engagement” (p. 152). IP is not a useful tool because its personal property-like protection of wealth and investment does not work for creators who feel personally tied to their reputations embedded in relationships with others. Reputation seems to be the thing that creators and inventors value the most and yet the claims they’d wish to pursue to protect it barely fit established IP categories, if at all. Silbey, thus, finds a minimal role for IP and legal processes in protecting reputation. As she argues, “beyond that basic protection of trademark as one’s business identity, interviewees successfully build, protect, and distinguish their valuable reputation in many other ways” (p. 183).

The part of the book that resonated most for me was Chapter 5, when Silbey explained something that I had observed. This chapter titled “Instruction: How Lawyers Harvest Intellectual Property” is the first elaboration I have seen of how lawyers act as IP teachers or translators outside of the university technology transfer context. For many years teaching IP law I have noted that students who pursue IP law often end up spending much of their time teaching it to others, as opposed to litigating or engaging in other more traditional forms of lawyering. Silbey explains that IP lawyers will disrupt a creator or innovator by identifying a previously unknown (legal) risk present in a situation. The lawyer then has to teach those clients how to manage the risk. This they do through seminars, teaching materials and other training to self-consciously shape behavior and culture to be more IP-centered. This process of norm creation is interesting as it suggests IP law does not very accurately reflect endogenous normativity, an unsurprising conclusion given the other findings in this book. It has significant implications for the type of education and training that might best aid students who wish to work in IP law.

Silbey wraps up the book by bringing her relational focus to the traditionally one-sided issue of IP distribution. The distribution discussion is normally framed as being about how best to distribute IP artifacts to users for money. Silbey extends this discussion to focus on the overlooked “public” feature of IP dissemination, i.e., how dissemination can constitute a public or community interest. Silbey finds that not only are her interviewees making money through distribution, but in many cases they are also engaging with one another and developing core competencies. The most intriguing parts of the chapter were the sections on sharing and holdouts. Silbey finds that sharing is the most popular form of distribution among the interviewees. One of the more interesting findings on sharing was that not only is it

passively tolerated but in many cases, encouraged, by taking steps to free an invention, in this case, from the bankruptcy of its patent holders (p. 257). Sharing, rather than the “many and more” strategy that characterizes traditional distribution methods, builds relationships, while stimulating reuse and further creativity. The counter-intuitive holdouts are folks who choose not to circulate their works because of identity interests, or to maintain the quality or integrity of their works. In many cases, these holdouts sounded like they would be served well by some sort of moral rights, as Silbey points out (p. 270). The chapter ends with an appeal to lawmakers to look to practice for the signals about what creators and innovators think IP law should look like, rather than accepting IP law’s excessively broad exclusivity rules.

IP scholars have for many years now been attempting to reconcile the canonical story of innovation, as told through the lens of IP law, and how people actually create and innovate. They have been aided by the growth of an IP scholarship that has become more critical, empirical, interdisciplinary and curious. Silbey’s wonderful book is an example of the best of this scholarship applied to questions at the core of IP anomie. Her book is authoritative and satisfying to read, drawing as it does from a solid foundation of multi-year empirical work understood through rigorous qualitative research methods and data analysis, a type of scholarship still relatively uncommon in IP studies. The best part about Silbey’s book is the extent to which she refocuses IP policy discussion on the day-to-day work and the emotional, multi-dimensional people who create and innovate, as she moves discussion away from the product. When stressing the product, conversation inevitably becomes focused on its abundance, ownership, and location. Discussion about the work leading to the product considers the relationships that are created and sustained by the product and leads to a better understanding of the nature of IP law and labor. Silbey’s processual approach allows us to ignore the tediously predictable rational actor and gives shape to the more familiar, empathetic, nuanced and inspiring people that Silbey interviewed. She explores the relatively uncharted affective dimension of IP creation which is often about preserving, creating or nurturing identity, reputation and relationships. Silbey’s call to consider the constitutional ideal of “progress” in IP as more than economic is shown so clearly by the interviews that it almost does not need to be stated. When I finished, the only thing I wanted from the book was more - more interviews with respondents in the context of others with whom they work, more detail about the interviewees (impossible given research ethics), more about whether their behavior over time reflected what they stated in the study and more. My desire for more told me that Silbey has authored a dexterous, foundational work that should become the starting reference point for anyone involved in IP advocacy, policy change, and research into creativity and innovation.

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