

UC Irvine

UC Irvine Previously Published Works

Title

Cheap Creativity and What It Will Do

Permalink

<https://escholarship.org/uc/item/3mc1304f>

Author

Burk, Dan

Publication Date

2023-07-13

Peer reviewed

CHEAP CREATIVITY AND WHAT IT WILL DO

*Dan L. Burk**

Artificial intelligence (AI), in the form of machine learning systems, is becoming widely deployed across many industries to facilitate the production of new technical or expressive works. Among other applications, these technologies promise rapid product design and creation, often exceeding the capacity of human creators. Commentators and policy makers have responded to these developments with a flood of literature analyzing the ways in which AI systems might challenge our existing regimes of intellectual property. But such discussions have thus far focused on entirely the wrong questions, misunderstanding the nature of the changes that AI brings to creative development.

Intellectual property is generally styled as a solution to the “appropriability” or “public goods” problem in creative and innovative production: offering a legally enhanced incentive to invest in goods that are expensive to produce, but cheap to appropriate. But cost savings from AI systems will largely occur at a different point in the production process. AI systems promise (or threaten) to lower the cost of initial development of creative goods, potentially displacing human creators. Although machine learning systems are realistically unlikely ever to provide a complete substitute for human creative inputs, their incorporation into creative production will in effect automate the generative phases of the creative development process, substantially lowering the cost of the initial stage of production. Like other cost-saving industrial automation, this can be expected to displace human labor and redefine human roles in production.

The history of past automated labor displacements teaches us something of what will occur as creativity is automated. In this light, I begin to reframe the discussion of intellectual

* Chancellor’s Professor of Law and Distinguished Professor of Law, University of California, Irvine. My thanks to Stefan Bechtold, L. Jean Camp, Thibault Schrepel, Chris Sprigman, and participants in the 2021 Intellectual Property Scholar’s Conference for helpful comments on earlier versions of this Article.

property and artificial intelligence, showing the impact machine learning will have on human creativity and innovation, and the implications these changes for intellectual property doctrine and policy. In particular, I show that cheap substitutes for human creativity will drive a shift toward forms of intellectual property that certify authenticity rather than those that incentivize production and distribution. Armed with this understanding, we can begin to address the question of how to foster human engagement in an age of synthetic creativity.

TABLE OF CONTENTS

I. INTRODUCTION.....	1672
II. INTERSECTING AI AND IP	1673
A. JUSTIFYING INTELLECTUAL PROPERTY.....	1676
B. SYNTHETIC CREATIVITY.....	1679
III. VALUING AUTHENTICITY.....	1682
A. CONSTRUCTING AUTHENTICITY	1688
1. <i>Comprehending Authenticity</i>	1689
2. <i>Authentic Commodities</i>	1692
3. <i>Mass-Market Commodities</i>	1694
IV. THE ONCE AND FUTURE ROLE OF IP	1696
A. SHIFTING IP REGIMES.....	1697
B. TRADEMARK AUTHENTICATION	1700
1. <i>Branding and Self-Narrative</i>	1703
2. <i>Recasting Trademark Authenticity</i>	1706
V. CONCLUSION.....	1710

I. INTRODUCTION

Artificial intelligence (AI) systems are increasingly a presence in the generation of creative and innovative products. There is, to be sure, nothing that might be robustly considered “intelligent” in such AI devices, which are a species of machine learning technology that might better be termed “pattern recognition software” or “iterative statistical optimization systems.”¹ But setting aside their unnecessarily anthropomorphic labels, machine learning systems show increasing facility for generating a variety of creative outputs, including graphics, text, and music. On the technical side, they are increasingly used to design new machines,² develop new pharmaceuticals,³ or optimize industrial processes.⁴ These capabilities foreshadow a fundamental shift in the structure of creative industries, as automated production replaces capabilities formerly supplied only by human workers.

Given that these technologies provide tools to create outputs that fall within the traditional subject matter of intellectual property (IP) regimes, such as copyright or patent, the burgeoning role of AI systems in the creation of intellectual goods has raised questions about the future role of intellectual property law in fostering the generation of creative works.⁵ Much of what has been written on the

¹ Dan L. Burk, *AI Patents and the Self-Assembling Machine*, 105 MINN. L. REV. HEADNOTES 301, 303 (2021).

² Ahmed K. Noor, *AI and the Future of Machine Design*, 139 MECH. ENG. 38, 38 (2017).

³ See Deeblena Paul et al., *Artificial Intelligence in Drug Discovery and Development*, 26 DRUG DISC. TODAY 80, 80 (2021).

⁴ See Suzanne Gill, *AI Used to Control Process Manufacturing Operation*, CONTROL ENG. (June 5, 2022), <https://www.controleng.com/articles/ai-used-to-control-process-manufacturing-operations/>; Damas Limoge, *AI Process Control for Adaptive Manufacturing*, IND. TODAY (Oct. 15, 2020), <https://industrytoday.com/ai-process-control-for-adaptive-manufacturing/>.

⁵ See, e.g., Shlomit Yanisky Ravid & Xiaoqiong (Jackie) Liu, *When Artificial Intelligence Systems Produce Inventions: An Alternative Model for Patent Law at the 3A Era*, 39 CARDOZO L. REV. 2215 (2018) (discussing AI and patents); Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 57 B.C. L. REV. 1079 (2016) (discussing AI and patent); Bruce Boyden, *Emergent Works*, 39 COLUM. J.L. & ARTS 377, 389 (2016) (discussing AI and copyright); James Grimmelman, *There's No Such Thing as a Computer-Authored Work—And It's a Good Thing, Too*, 39 COLUM. J.L. & ARTS 403 (2016) (discussing AI and copyright); Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 5 (discussing AI and copyright); Liza Vertinsky & Todd M. Rice, *Thinking About Thinking Machines: Implications of Machine Inventors for Patent Law*, 8 B.U. J. SCI. & TECH. L. 574, 581 (2002) (discussing AI and patent).

topic to date has mistakenly focused on unproductive questions about whether machine learning can be considered an “inventor”⁶ or an “author”⁷ under existing intellectual property regimes. Such inquiries not only take the euphemism of “artificial intelligence” too seriously, they largely miss the actual points of impact AI is having on creative production.

In this Article I begin to sketch out a set of more pertinent questions that we *should* be asking with regard to the intersection of AI and intellectual property. I begin by showing the new industrial inputs generated by machine learning provide a substitute for human creativity, and the implications this synthetic creativity has for the trajectory of intellectual property law. In particular, I argue that this new input lowers costs in a different way than that contemplated by our regimes of patent and copyright law, which are largely concerned with costs of reproduction and distribution. Specifically, I argue that this newly cheap creativity shifts our concern away from the problems of unauthorized reproduction and falling marginal costs toward concerns over the value of authenticity. This I suggest is largely a result of known social reaction to industrialization. To support this argument, I briefly explore the social construction of authenticity, and the certification of authenticity, which does not necessarily include certification of veracity. Finally, I illustrate these effects in the context of trademark law, exploring the coming distinction of human and synthetic creation.

II. INTERSECTING AI AND IP

We should certainly begin our exploration of AI applications by recognizing that the term “artificial intelligence” is an unfortunate misnomer. The technologies in question are performative, artificial, but are not intelligent in any robust sense of the term. Certainly they entail no intelligence in the cognitive sense that we associate with

⁶ See Burk, *supra* note 1, at 307 (disputing claims that AI systems should be considered inventors under the U.S. patent system).

⁷ See Dan L. Burk, *Thirty-Six Views of Copyright Authorship*, by Jackson Pollock, 58 HOUS. L. REV. 263, 265–66 (2020) (disputing claims that AI systems should be considered authors under the U.S. copyright system).

humans, or even with animals.⁸ Computer science has long investigated the possibility of developing such machine cognition, which is sometimes referred to as “Good Old Fashioned AI” or “GOF AI.”⁹ Sometimes it is labeled “strong” AI.¹⁰ Success in developing such systems has been elusive and there are compelling reasons to think that, absent some radical change in the nature of computing technology, artificial intelligence of this type will never be developed. Research toward that end continues, but remains entirely science fiction rather than a matter of serious or immediate concern.¹¹

The current furor over AI systems concerns instead a much more modest sub-species of AI known as “machine learning.”¹² Even this terminology is somewhat unfortunate, as machines do not learn in the sense that humans or animals do, any more than they are intelligent in that sense. We might think of these devices as “pattern recognition systems”—although, again, we must emphasize that terming the mechanical matching of such systems as “recognition” might be the source of some potential misunderstandings. A better descriptor might be “statistical optimization systems.” Although several types of approaches are used in the machine learning space, in general, such software is designed to iteratively generate and fit statistical models to the data, detect correlations, and then successively match such models closer and closer to the parameters specified for a match.¹³

⁸ See Marion Fourcade & Kieran Healy, *Seeing Like a Market*, 15 SOCIO-ECON. REV. 9, 24 (2017) (observing that artificial intelligence research abandoned the idea of developing machines that can think in favor of machines that can learn).

⁹ See M.C. Elish & danah boyd, *Situating Methods in the Magic of Big Data and AI*, 85 COMM. MONOGRAPHS 57, 62 (2018) (describing the current emphasis on machine learning over “good old fashioned” AI).

¹⁰ See John R. Searle, *Minds, Brains, and Programs*, 3 BEHAV. & BRAIN SCI. 417, 417 (1980) (“[A]ccording to strong AI, the computer is not merely a tool in the study of the mind; rather, the appropriately programmed computer really is a mind, in the sense that computers given the right programs can be literally said to understand and have other cognitive states.”).

¹¹ See Elish & boyd, *supra* note 9, at 62 (noting that current perceptions of machine learning are often framed in the “cultural imaginaries” of science fiction).

¹² *Id.*

¹³ Adrian Mackenzie, *The Production of Prediction: What Does Machine Learning Want?*, 18 EUR. J. CULTURAL STUD. 429, 435 (2015); see also Celia Lury & Sophie Day, *Algorithmic Personalization as a Mode of Individuation*, 36 THEORY, CULTURE & SOC’Y 17, 24 (2019) (explaining that predictive algorithms construct iterative approximations rather than establish relations of absolute equivalence).

This technology has a wide range of potential applications, but those of interest here are uses most likely to intersect with regimes of intellectual property law—that is, applications of machine learning to generate novel creative or technical subject matter. Myriad such uses are emerging. Machine learning systems might be trained, for example, on digitized versions of the most popular “hit” musical compositions, detecting the patterns that characterize a popular song, and then from that model generate innumerable new compositions that will presumably appeal to audiences in the same way.¹⁴ Other types of music may be analyzed and generated in the same fashion,¹⁵ as may the visual art of particular artists, periods, and styles.¹⁶ AI systems have been trained to generate standardized news reports, and it is now routine for machine learning systems to write short newspaper features, such as sports score reporting.¹⁷ AI systems are progressing toward the generation of more complicated texts, and may be expected to generate dramatic scripts, screenplays, stories, and other literary works.¹⁸

These have not surprisingly attracted the attention of legal scholars concerned about the implications for intellectual property. Considerable energy has already been invested in deliberating the assignment of authorship and inventorship where AI tools are used for creative development. Proposals range from the absurd (such as assigning ownership to the AI system) to the complex and probably unnecessary (such as amending the copyright and patent statutes

¹⁴ See Ty Pendlebury, *Making the Next Beatles: How AI is Changing Pop Music*, CNET (Jan. 12, 2022, 4:00 AM), <https://www.cnet.com/culture/entertainment/features/could-ai-create-a-future-grammy-award-winner-in-music/>.

¹⁵ See, e.g., Andrew R. Chow, “*There’s a Wide-Open Horizon of Possibility.*” *Musicians Are Using AI to Create Otherwise Impossible New Songs*, TIME (Feb. 5, 2020, 2:02 PM), <https://time.com/5774723/ai-music/> (“[A] host of musicians and researchers across the world are developing tools to make AI more accessible to artists everywhere.”).

¹⁶ See, e.g., Siobhan Roberts, Tanya Basu, Charlotte Jee & Patrick Howell O’Neill, *Machine Creativity Beats Some Modern Art*, MIT TECH. REV. (June 30, 2017), <https://www.technologyreview.com/2017/06/30/150666/machine-creativity-beats-some-modern-art/> (discussing the ability of AI to “reproduce certain artistic styles”).

¹⁷ See, e.g., Stephen Beckett, *Robo-Journalism: How a Computer Describes a Sports Match*, BBC (Sept. 12, 2015), <https://www.bbc.com/news/technology-34204052> (providing examples of “robo”-written sports articles).

¹⁸ See Luke Hurst, *AI Writing is Here, and It’s Worryingly Good. Can Writers and Academia Adapt?*, EURONEWS.NEXT (Aug. 11, 2022), <https://www.euronews.com/next/2022/11/08/ai-writing-is-here-and-its-worryingly-good-can-writers-and-academia-adapt> (“Even highly skilled jobs like journalism and novel-writing could eventually be replaced by machines.”).

to assign ownership to human users).¹⁹ These are simply the wrong questions to be considering. The law of copyright and patent, as I have argued elsewhere, is well able to sort out questions of authorship and inventorship.²⁰ And as Pamela Samuelson observed many years ago, “[o]nly those stuck in the doctrinal mud could even think that computers could be ‘authors.’”²¹ Although we certainly need to be re-considering the proper role of intellectual property law in a world where machine learning tools are common, there are harder (if perhaps less sensational) issues that deserve our attention.

A. JUSTIFYING INTELLECTUAL PROPERTY

In order to focus on the correct set of questions for AI and IP, we must first remind ourselves of the policy justifications for deploying the exclusive rights entailed in intellectual property systems. We have typically conceived of the branches of intellectual property that I will call “substantive” intellectual property—patent and copyright being the paradigm cases—as addressing some version of the “public goods” or “appropriability” problem.²² I refer to these branches of intellectual property as “substantive” because they are justified as a mechanism to change the character and occurrence of the subject matter they cover. In doing so, these branches of intellectual property seek to correct a potential undersupply of

¹⁹ See, e.g., Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, FLA. L. REV. (forthcoming 2023) (recommending attribution of authorship to AI software); Shlomit Yanisky-Ravid & Luis A. Velez-Hernandez, *Copyrightability of Artworks Produced by Creative Robots and Originality: The Formality-Objective Model*, 19 MINN. J.L. SCI. & TECH. 1, 50 (2018) (same); Shlomit Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—The Human-like Authors are Already Here—A New Model*, 2017 MICH. ST. L. REV. 659, 671–72 (recommending a statutory amendment to create AI works made for hire).

²⁰ See Burk, *supra* note 1, at 307 (discussing how existing patent law has inventorship “well in hand”); Burk, *supra* note 7, at 320–21 (discussing authorship as it relates to AI); see also Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2100–01 (2020) (arguing very sensibly that AI generated works are either the works of human authors or lie in the public domain).

²¹ Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1200 (1986). The observation holds equally true for thinking computers could be “inventors.” See Burk, *supra* note 1.

²² Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 ANN. REV. L. & SOC. SCI. 397, 400–01, 403 (2012).

creative or innovative goods that are expensive to create, but inexpensive to distribute, reverse engineer, or reproduce.²³

The anticipated asymmetry between costs of creation and costs of distribution that gives rise to these intellectual property regimes is largely a product of technological development. Technological advances increasingly lower the costs for reproduction and distribution of creative works; technological advances make low-cost appropriation of intellectual goods widespread and ubiquitous.²⁴ This narrative is well illustrated, for example, in the history of copyright law, beginning with the printing press and running through successive technological developments up to modern digital computing systems.²⁵ The time and labor required to produce a book by hand ensures that there will be relatively few copies available, and those scarce copies will command a premium price.²⁶

Printing technology lowers such costs, although the resource intense process of book production still requires substantial capital investment in printing equipment, storage, and transportation.²⁷ Digital technologies lower costs of reproduction and distribution even further, effectively placing publishing capabilities in the form of microcomputers on millions of desks, and transferring copies across electronic networks as bits rather than as atoms. These technologies make difficult recouping the initial investment of writing, editing, and production, since it is nearly impossible to exclude subsequent “free riders” who choose not to pay for the appropriable good. Copyright therefore seeks to impose legal exclusivity on goods whose appropriation cannot easily be physically restricted.²⁸ In a world where books are copied by hand in a scriptorium, there is no real need for copyright law; only once reproduction becomes cheap does copyright become a necessity.

A similar story can be told in patent law, taking for example pharmaceutical generic copying as a paradigm case. Drug discovery

²³ *Id.* at 401.

²⁴ See *How Books Became Cheap*, LAPHAM'S Q. (July 30, 2020), <https://www.laphamsquarterly.org/roundtable/how-books-became-cheap>.

²⁵ See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD* 24–50 (2d ed. 2019) (tracing the historical development of copyright law).

²⁶ See *id.* at 180.

²⁷ *Id.*

²⁸ See Mario Biagioli, *Weighing Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?*, 57 HIST. SCI. 140, 141 (2019).

and regulation is expensive, but mass production of the final product is relatively cheap.²⁹ Once a pharmaceutical product has been released on the market, it is generally quite inexpensive for competitors to copy the compound and sell it at a cost below that incurred by the initial developer, as the competitor incurs no development costs.³⁰ The exclusive rights associated with patents are therefore believed to be necessary to exclude low cost copying for long enough to recoup the initial development costs—otherwise, knowing the product would be copied, no one would hazard the initial development costs.³¹ Thus, in each case, intellectual property is justified as a legal tool to prompt investment in goods where creation is expensive but appropriation is cheap.

Or so the story goes. Various commentators have observed that there is little empirical evidence supporting this story, and it may well be that in many cases the legal exclusivity imposed by intellectual property does more harm than good.³² We know that there are substantial social costs imposed by restricting access to intellectual goods.³³ Intellectual property imposes restraints on trade, curtails valuable protected speech, and inflicts artificially inflated prices on consumers.³⁴ Some have framed this problem in terms of an “incentive-access” dilemma; our hope is that the value arising from the incentive for generating additional creative works exceeds the costs created by exclusivity, although that balance between incentives and access is often difficult to measure.³⁵ The

²⁹ See DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 80–81 (2009) (summarizing cost dynamics of pharmaceutical development).

³⁰ See Olga Gurgula, *Strategic Patenting by Pharmaceutical Companies—Should Competition Law Intervene?*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. 1062, 1066 (2020).

³¹ *Id.*

³² See, e.g., PAUL J. HEALD, *COPY THIS BOOK!: WHAT DATA TELLS US ABOUT COPYRIGHT AND THE PUBLIC GOOD* xv (2020); GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* (2018); MICHAEL J. MEURER, & JAMES BESSEN, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008).

³³ See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487–88 (1996) (summarizing costs imposed by copyright).

³⁴ See Christopher A. Cotropia & James Wilson, *The Upside of Intellectual Property Law's Downside*, 57 UCLA L. REV. 925–38 (2010) (explaining intellectual property law's downsides).

³⁵ See Lunney, *supra* note 33, at 655–56 (summarizing the balance of incentive and access for copyright); see also David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 124–26 (2010) (analyzing intellectual property regimes in terms of net benefits).

evidence for successful provision of incentives is equivocal at best.³⁶ Provision of intellectual property incentives is to some extent a matter of ideology and faith with uncertain benefits.³⁷ But let us accept the conventional intellectual property narrative for the moment, in order to assess how it relates to the anticipated introduction of AI systems into creative industries.

B. SYNTHETIC CREATIVITY

The incentive story outlined above is the usual story we tell to justify substantive intervention into the marketplace via intellectual property: We reason that we need legal exclusivity to encourage development of valuable commodities that are expensive to create initially, but which technology makes inexpensive to distribute, copy, or appropriate thereafter.³⁸ But regardless of the success of intellectual property laws in that regard, machine learning systems pose a fundamentally different challenge to intellectual property incentives. Of course, there is no doubt that some applications of machine learning will lower the costs of appropriability; AI technology may well have an impact in the sectors of the supply chain toward which intellectual property is oriented, further lowering the costs of distribution, reproduction, reverse engineering, and so on.³⁹ But that is not the set of applications that promise to challenge our notions of intellectual property—indeed, it is hard to see how AI, or any other technical advance, could lower such costs much further, as in many cases they are already approaching nil.⁴⁰

To the contrary, the fundamental rationale for intellectual property appears to have little or nothing to do with the applications of AI to creation as mentioned at the beginning of this Article. AIs will lower costs in a different region of the production function. The transformative uses of AI now under contemplation operate not to

³⁶ See Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1345 (2015).

³⁷ *Id.*

³⁸ See Biagioli, *supra* note 28, at 141.

³⁹ See Benjamin L.W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 48 (2017).

⁴⁰ See Biagioli, *supra* note 28, at 141 (characterizing the act of appropriating inventions and works of authorship as “easy” in contrast to the expensive nature of the initial creation of those works).

further facilitate appropriability, but at a different point in the development of intangibles—at the initial phase of creation. These systems should not be expected to challenge intellectual property law, as past technologies have done, by lowering the costs of reproducing and distributing the fruits of intellectual labor. AIs instead promise to lower or to displace the costs of intellectual labor in the first instance.

Thus, *rather than lowering the cost of appropriability for works that are expensive to create, AIs make initial creation itself inexpensive.* Intellectual property law, as typically described, attempts to solve the problem of expensive creations that can then be easily appropriated by consumers, so that there is little incentive to create the goods in the first instance. AI threatens to lower the costs of creation itself, so that creative works—however easy to access—are cheap to produce in the first place. This in some sense provides a solution, or a partial solution, to the incentive-access dilemma, by lowering the costs of initial creation, obviating some of the need for the initial incentive. When the costs of initial creation are lowered, the need for an incentive to make the initial investment is lowered as well.

But, crucially, in the course of doing so, AIs may obviate the *need for initial creators*, at least in some instances. The implication of automating the initial creative stage of product development is that AIs will replace a type of labor that formerly was reserved exclusively to human intellect. Stated differently, such automated labor in effect provides a *synthetic substitute for human creativity*. I set aside here any discussion as to whether AIs are “truly” creative in the generation of such inputs. My own view is that, lacking any degree of self or situational awareness, they cannot be. But whether that view is correct, or even defensible, is entirely beside the point—as I have suggested above, that is the wrong question to be concerned about.⁴¹ What matters is that the output of AI systems can serve as a replacement for human creative input. In the near future I need not, let us say, hire a composer to write a score for my motion picture or television series; an AI can learn the patterns of such musical compositions and generate one to spec. Other aspects of such production—camera work, editing, sound mixing, perhaps

⁴¹ See *supra* notes 19–20 and accompanying text.

even script writing—previously performed by skilled and creative humans can likely be similarly and successively automated.

We can best understand this point by thinking about other examples of industrial inputs. There is already a long history of human ingenuity having supplied any number of synthetic substitutes for previously existing production inputs. Such substitutes may be functionally equivalent or even superior to the original input—synthetic rayon may or may not be superior in one aspect or another to natural silk, but as an industrial input it has in many cases been an acceptable or superior substitute.⁴² In the case of AI inputs, once again, human ingenuity is on the verge of supplying an acceptable artificial or synthetic substitute for human creative contributions. Synthetic creativity in many cases may well be functionally equivalent, or perhaps even superior, to the industrial input it replaces. My concern here is not whether AI substitution is in some sense “genuine creativity,” but rather with the social and legal implications of making the substitution.

Thus, as misguided as the current obsession with AI authorship or inventorship may be, looking past its needless anthropomorphizing of the technology, such concerns may include an intuition that points toward the set of questions that we should be addressing. The question now for intellectual property law is not so much how or whether to assign the rights in automated works—current doctrine allows us to locate someone in whom such rights will vest.⁴³ And AI systems themselves, of course, require no incentives to create; they will (quite literally) mindlessly pursue whatever task they are set by their creators and users.

Rather, the concern with AIs as creators entails a recognition that AI will be transformative at the point of initial creation, where human creativity has typically been the generative mechanism. This shift threatens to sideline the substantive branches of intellectual property law—not rendering them irrelevant, but posing problems that are entirely orthogonal to the problems that patent and copyright were intended to solve. Machine learning systems potentially remove the human from the initial creation of innovative works and inventions, and this compels us to ask what it might mean for humans to be creators in a world of cheap AI

⁴² M.G. Luft, *Rayon—Man-Made Silk*, 2 J. CHEM. EDUC. 864, 864 (1925).

⁴³ See *supra* notes 19–21.

creativity, or at least in a world of cheap substitutes for creativity.⁴⁴ The concomitant overarching question for intellectual property law is whether it has a role in fostering continued human creativity, and if so, how might it do so?

III. VALUING AUTHENTICITY

The pressing question for intellectual property policy, then, is how the automation of creative labor changes the incentives that intellectual property is intended to address. Here we will trace one branch of that inquiry. Fortunately, history gives us some clues as to what we can expect in the face of what has been called a third (or possibly fourth) industrial revolution.⁴⁵ We have a fairly good idea from existing scholarship and experience what the reaction to automating the creative process is likely to be. Social and cultural changes resulting from mass production in the first mechanical industrial revolution are well documented. Thus, the history of past automated labor displacements teaches us something of what we can expect to occur as creative cognitive labor is automated.

Stated briefly, past displacement of human craftsmanship has typically resulted in a kind of initial fascination with the novelty of the machine-made goods. But as the supply of such artifacts becomes routine and settled, society begins to place an increasing value on the fruits of human production, imperfect and inefficient as they may be. Indeed, the imperfections and rarity of the human-generated goods become an emblem of “authenticity,” while the affordability, accessibility, and ubiquity of the machine-generated versions become emblematic of the “inauthentic.”

To take only one prominent example among many, the British Victorian reaction to the “first” industrial revolution of mechanized mass production is instructive. Rejecting the output of mass

⁴⁴ See JOANNA ZYLINSKA, *AI ART: MACHINE VISIONS AND WARPED DREAMS* 7, 54–55 (2020) (arguing the proper question is not whether machines can be creative, but rather how humans can be creative in the context of AI).

⁴⁵ See *The Third Industrial Revolution*, *THE ECONOMIST* (Apr. 21, 2012), <https://www.economist.com/leaders/2012/04/21/the-third-industrial-revolution> (“Now a third revolution is underway. Manufacturing is going digital.”); see also Klaus Schwab, *The Fourth Industrial Revolution: What it Means, How to Respond*, *WORLD ECON. F.* (Jan. 14, 2016), <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (“Now a Fourth Industrial Revolution is building on the Third, the digital revolution that has been occurring since the middle of the last century.”).

production as soulless and inhuman,⁴⁶ William Morris and his associates in the Pre-Raphaelite movement reverted to advocacy and practice of hand-crafted production in the style of Renaissance and medieval artisans.⁴⁷ They founded the design and production company Morris & Co. to fabricate artisan goods, initially for bespoke commissions, but ultimately for the middle classes.⁴⁸ Their hand-crafted furniture and block-printed wall papers captured the imagination of the British public, fueling the international Arts & Crafts movement across Europe and the U.S., resulting in architectural and interior design motifs that persist today.⁴⁹

We see the same pattern across a wide range of reactive products and services, whether we are considering craft beers,⁵⁰ locally sourced produce,⁵¹ tourism,⁵² or refurbished historic housing.⁵³ Consumers effectively replace abundance with scarcity by rejecting lower cost automated production and reverting to insistence on slower, costlier artisan production.⁵⁴ Artisan or traditional methods are labeled “genuine” or “authentic” while automated output is denigrated as inauthentic—even in situations where the quality of

⁴⁶ See Alan Crawford, *W. A. S. Benson, Machinery, and the Arts and Crafts Movement in Britain*, 24 *J. DECORATIVE & PROPAGANDA ARTS* 94, 96 (2002).

⁴⁷ GILLIAN NAYLOR, *THE ARTS AND CRAFTS MOVEMENT: A STUDY OF ITS SOURCES, IDEALS, AND INFLUENCE ON DESIGN THEORY* 96–97 (1971); Fiona MacCarthy, *William Morris*, *OXFORD DICTIONARY NAT'L BIOGRAPHY* (Oct. 8, 2009), <https://www.oxforddnb.com/display/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-19322;jsessionid=96F0A9DBF3D7AA97518307CA01D6A98A>.

⁴⁸ See Charles Harvey & Jon Press, *The Businessman*, in *WILLIAM MORRIS* 49, 51–54 (Linda Parry ed., 1997).

⁴⁹ See LIN CARTER, *IMAGINARY WORLDS* 22–23 (1973).

⁵⁰ See Thomas Thurnell-Read, *A Thirst for the Authentic: Craft Drinks Producers and the Narration of Authenticity*, 70 *BRIT. J. SOCIOLOG.* 1448, 1452 (2019).

⁵¹ See Kaelyn Stiles, Özlem Altıok & Michael M. Bell, *The Ghosts of Taste: Food and the Cultural Politics of Authenticity*, 28 *AGRIC. HUM. VALUES* 225, 226 (2011); Sharon Zukin, *Consuming Authenticity: From Outposts of Difference to Means of Exclusion*, 22 *CULTURAL STUD.* 724, 736 (2008).

⁵² See Jillian M. Rickly-Boyd, *Authenticity & Aura: A Benjaminian Approach to Tourism*, 39 *ANN. TOURISM RSCH.* 269, 278 (2012); George Hughes, *Authenticity in Tourism*, 22 *ANN. TOURISM RSCH.* 781, 781–82 (1995).

⁵³ See Zukin, *supra* note 51, at 728–30.

⁵⁴ Cf. Barton Beebe, *Intellectual Property and Post-Scarcity Society*, 2019 *SING. J.L. STUD.* 377, 385 (arguing that consumers “will seek in the things they consume some form of individuality, some degree of difference as against the crowd, and to do so, they will seek out things that somehow remain rare”)

production is equivalent to that of human labor, or when the automated output is materially superior. The valuation of “authenticity” may even increase the desirability of flaws or imperfections that demonstrate the origin of artisan products.

Indeed, this counterpoint to automation to some extent turns one narrative of machine production on its head. Mechanization allows the inhumanly exact repetition of productive action, standardizing commercial output to technical perfection. The erratic results of human failure can be automated away, and consumers can be supplied with an unending stream of affordable, uniform, and copious goods. But against such productive regularity, the misplaced color, the jagged edge, the errant thumbprint all become desired characteristics of personality and personalization. Much as the Mideastern carpet weaver is said to deliberately introduce a flaw into the design in recognition that only Allah can produce perfection,⁵⁵ the imperfections in handicrafts become the tokens of the values placed on the humanity of the crafter.

We might suppose that this effect would have less traction in technical innovation, where the efficiency and efficacy of new products would seem the primary values to be effectuated. Consumers might be expected to invest greater meaning in the provenance of expressive or esthetic creations than in technical innovation. But we cannot entirely discount the tendency to value human connection, even in areas of technical achievement. Designations such as “German engineering”⁵⁶ or “Yankee ingenuity”⁵⁷ have long been indicative of an aura of superior technical quality arising from ad hominem associations.

Thus, as Barton Beebe has observed in a related context, authenticity re-imposes scarcity in the face of technological

⁵⁵ See AMIR TAHERI, *THE SPIRIT OF ALLAH* 40 (1986) (“Only Allah is capable of perfect creation . . .”); WILLIAM DE LANCEY ELLWANGER, *THE ORIENTAL RUG: A MONOGRAPH* 21 (1903) (“[Rugs] must show some defect, in proof that Allah alone is perfect.”); V. GURDJJI, *ORIENTAL RUG WEAVING* 19 (2d ed. 1901) (“It is thus intended to Show that nothing but Allah (God) can be perfect.”).

⁵⁶ See *What the World Can Learn from Germany’s Engineering Culture*, ENG’G DAILY (Mar. 1, 2017), <https://www.engineeringdaily.net/what-the-world-can-learn-from-germanys-engineering-culture/> (discussing the meaning of German engineering in the context of technological innovation).

⁵⁷ See Stephen Meardon, *Yankee Ingenuity in Theories of American Economic Development, from the Founding to the Closing of the Frontier*, 50 *HIST. POL. ECON.* 41, 56 (2018).

abundance.⁵⁸ The shift to valuing the “hand-made” or “artisan” product re-imposes a particular type of scarcity on the abundance of creative substitutes, valuing what Walter Benjamin once termed the ineffable “aura” of authenticity.⁵⁹ In an influential essay, Benjamin argues that technological reproduction of cultural artifacts, as through photography, alters the relationship of the object with the public, divesting the artifact of its authenticity and authority.⁶⁰ According to Benjamin, technologically mediated reproductions lack the unique situation of time, location, and provenance that confer on the artifact the aura of authenticity.⁶¹ The concept of scarcity is thus implied in Benjamin’s analysis, to identify the quality that distinguishes craft from manufacture—a relationship to particular time and circumstance that sets human production apart from mechanical reproductions.⁶² Significantly, Benjamin noted that both “authentic” artifacts and technical reproductions lend themselves to different strategies of public political manipulation.⁶³

Decades later, at the dawn of the commercial Internet, digital activist John Perry Barlow offered a related set of observations regarding digitally reproduced information goods, and the role of intellectual property in capturing the value of such goods.⁶⁴ Barlow observed that enforcement of legal exclusivity becomes less tenable as reproduction technology becomes ubiquitous, so that other strategies for capturing value become necessary.⁶⁵ He argued that the value of information is relational, so that the value of informational goods is best captured by structuring the recipient’s experience with the goods.⁶⁶ Such relations include authenticity of

⁵⁸ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 870 (2010); see also Beebe, *supra* note 54 (postulating more generally that intellectual property will be deployed to re-institute scarcity in response to abundance).

⁵⁹ WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (1935), reprinted in *ILLUMINATIONS* 217, 221 (Hannah Arendt ed., Harry Zohn trans., N.Y. Schocken Books 1969).

⁶⁰ *Id.* at 225.

⁶¹ *Id.* at 220.

⁶² *Id.*

⁶³ *Id.* at 218–19, 224.

⁶⁴ See John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age. (Everything You Know about Intellectual Property Is Wrong.)*, WIRED (Mar. 1, 1994), <https://www.wired.com/1994/03/economy-ideas/>.

⁶⁵ See *id.* (discussing the need for a new method to capture the value of digital information).

⁶⁶ *Id.*

origin or provenance—such as the experience of a musical performance, rather than a recording of a musical performance—which are unique rather than digitally reproducible.⁶⁷

Benjamin and Barlow were of course concerned with the effects of reproduction technologies, the falling marginal cost of distribution problem identified above.⁶⁸ The question in the face of machine learning is not so much the fate of works in an age of mechanical *reproduction* as it is their fate in an age of mechanical *inception*. But the comments of Benjamin or Barlow on the role of relational authority or authenticity remain equally salient—perhaps even more salient—in the context of the substitution of human creativity. We can, for example, already reprint essentially infinite copies of graphics such as the visual works of Rembrandt van Rijn for popular consumption. These can be produced at any level of resolution and fidelity desired, including brushstroke reproductions of the original paintings. This does not change the value of the original paintings of course; the reproductions are not *authentic* in the sense of having been produced by the physical action of the painter Rembrandt. As Benjamin might say, only the initial Rembrandt painting carries an aura of authenticity; reproductions, no matter what their physical quality, lack this attribute.⁶⁹

Beyond reproducing existing images, machine learning technologies have already, to much fanfare, been trained to learn and mimic the style of Rembrandt in order to produce new works in a similar style.⁷⁰ It may be that before long AIs will be able to generate a substantial or infinite number of such novel works, which have been termed “zombie art,” for anyone who desires a unique picture in the style of Rembrandt, or Pollock, or another human artist.⁷¹ Again, this is unlikely to change the valuation of the actual pictures physically produced by those artists—such works are “authentic” in the association of the artist with their origination,

⁶⁷ *Id.*

⁶⁸ See *supra* notes 22–25 and accompanying text.

⁶⁹ For an exposition of the vicissitudes of authenticity in art, see Amy Adler, *Artificial Authenticity: Art, NFTs, and the Death of Copyright*, 98 N.Y.U. L. REV. at 23 (forthcoming 2023) (showing that even works factually originating with a particular artist may be deemed “inauthentic” in the art market).

⁷⁰ See ZYLINSKA, *supra* note 44, at 50–51.

⁷¹ See Tsila Hassine & Ziv Neeman, *The Zombification of Art History: How AI Resurrects Dead Masters, and Perpetuates Historical Biases*, 11 J. SCI. & TECH. ARTS 28, 28–29 (2019).

and the follow-on zombie works cannot be imbued with such authenticity.⁷²

Probably there is not a large market for zombie Rembrandt paintings; Rembrandt's work is not so much valued for its compatibility with current artistic tastes or interior décor as it is for its cultural and historical importance. Zombie art in the style of Rembrandt might be valued by some for whatever it entails of Rembrandt's distinctive style, but it lacks the historical and cultural value associated with the authentic Rembrandts. Indeed, in this sense even poster reproductions of Rembrandt are "authentic" in a way that novel AI-generated graphics in Rembrandt's style are not. We have already seen widespread criticism, bordering on revolt, of manga graphics generated via AI trained in the style of a recently deceased manga artist, Kim Jung Gi.⁷³ Fans rejected the novel posthumous zombie images as not only inauthentic but insulting to the legacy of the human artist.⁷⁴

This is not to say that pastiches and reproductions are never valued. As said above, AIs are capable of generating not only novel graphic works, but novel artistic works across a range of genres that might have contemporary appeal—for example, new musical works in the style of Mozart, or Duke Ellington, or the Rolling Stones.⁷⁵ Some listeners might value the music of such artists simply on its own characteristics and have a taste for additional similar compositions from whatever source. Elvis imitators and various tribute bands can sometimes make a modest living by providing entertainment in the style sought for consumption by certain audiences. But just as often fans will attach much of their valuation to the context of the works' production or performance, the association with the character, lifestyle, and persona of the originating artist.

Thus, our past experience with cheap reproduction or imitation gives us a good sense as to how the perception of authenticity plays out in a wide variety of situations. In particular, as Barlow predicted, authenticity has become a key factor in the generation of

⁷² See *id.* at 29.

⁷³ See Andrew Deck, *AI-Generated Art Sparks Furious Backlash from Japan's Anime Community*, REST OF WORLD (Oct. 27, 2022), <https://restofworld.org/2022/ai-backlash-anime-artists/>.

⁷⁴ *Id.*

⁷⁵ See *supra* notes 14–16 and accompanying text.

Internet content, where the production of information goods is often divorced from any personal interaction with the consumers of such goods.⁷⁶ The social turn toward authenticity has thus far been a reaction to industrial replication of fungible goods—to the falling marginal cost problem identified above.⁷⁷ But we may expect the social reaction to be the same when cheap creativity rather than cheap reproduction becomes the center of attention.

A. CONSTRUCTING AUTHENTICITY

The assertion that synthetic creativity will drive demand for authenticity forces us to stop and carefully consider what we might mean by this term, and how it operates in society. The examples I have already offered above indicate the difficulty of recognizing and defining Benjamin's somewhat ineffable "aura" of authenticity.⁷⁸ Looking specifically at commodities, the label of authenticity appears to designate in a variety of contexts a variety of values that the observer attaches to a commodity. Origin, or provenance, of a commodity sometimes determines the designation of authenticity, but not always, and not entirely.⁷⁹ The physical make-up of an item may determine its designation as authentic.⁸⁰ At the same time, the authenticity of a particular commodity may have little or nothing to do with the material characteristics of the output produced, or the connection may at best be conceptually tenuous.

Consider as illustration "New York" style bagels produced in Palm Beach, Florida—they may be touted as "authentic" in the sense of possessing the same flavor and texture as those made in New York City.⁸¹ They may further, or alternatively, be touted as

⁷⁶ See SARAH BANET-WEISER, *AUTHENTIC: THE POLITICS OF AMBIVALENCE IN A BRAND CULTURE* 81–82 (2012) (observing that the positioning of Internet technologies between public and private spaces drives practices of authenticity); see also Kerstin Radde-Antweiler, *Authenticity*, in *DIGITAL RELIGION: UNDERSTANDING RELIGIOUS PRACTICE IN NEW MEDIA WORLDS* 88, 88 (Heidi A. Campbell ed., 2013) (recounting the history and controversies surrounding on-line authenticity).

⁷⁷ See *supra* notes 22–25 and accompanying text.

⁷⁸ See *supra* note 59 and accompanying text.

⁷⁹ See Laura A. Heymann, *Dialogues of Authenticity*, 67 *STUD. L. POL. & SOC'Y* 25, 32–33 (2015) (discussing authenticity of provenance).

⁸⁰ See *id.* at 30–31 (discussing authenticity of material qualities).

⁸¹ See J. David Goodman, *A Florida Battle over "Brooklynized" Water*, *N.Y. TIMES: CITY ROOM* (Oct. 25, 2010, 3:28 PM), <https://archive.nytimes.com/cityroom.blogs.nytimes.com/>

authentic by virtue of using the same production methods or processes as bagels made in New York City, or as authentic by virtue of incorporating water identical to that used in New York City (supposedly the source of the distinctive flavor and characteristics of New York City bagels).⁸² But they will never be authentic in the sense of having been produced in the physical territory of New York City. Perhaps more saliently, bagels made in Florida with New York City water may be “authentic” New York bagels in their ingredients and production, but “inauthentic” in their relational dissociation from the community and practices of New York.⁸³ For some valences of authenticity, perhaps those undetectable by human perception, bagels fabricated in Palm Beach will always be suspect, ersatz round buns with a center hole.

1. *Comprehending Authenticity.* These mercurial qualities I have highlighted make it apparent that couching the impact of synthetic creativity in terms of authenticity puts us on familiar yet treacherous ground. Authenticity may seem, rather like Edward Lear’s nonsense word “runcible,” to be an all-purpose adjective.⁸⁴ Not surprisingly, the very substantial existing literature examining concepts of authenticity recognizes that the term is “notoriously difficult to define.”⁸⁵ Different uses of the term may seem ambiguous or even contradictory.⁸⁶ It appears in a wide variety of contexts: From musical or culinary norms, to the bona fides of news or entertainment programming, the character of politicians, or nostalgic practices or traditions, authenticity is repeatedly asserted as a desirable or essential quality.⁸⁷ It has become a particular talisman in the context of computer mediated communications,

2010/10/25/a-florida-battle-over-brooklynized-water/ (documenting legal dispute over Florida bagel production using water treated to reproduce New York City water).

⁸² *Id.*; see also Matt Blitz, *Is New York Water Really the Secret to the Best Bagels and Pizza?*, FOOD & WINE (June 22, 2017), (discussing the composition of New York City tap water as the alleged source of distinctive bagel characteristics).

⁸³ See Heymann, *supra* note 79, at 30–31 (distinguishing authenticity of provenance from authenticity of quality).

⁸⁴ See ALLAN METCALF, PREDICTING NEW WORDS: THE SECRETS OF THEIR SUCCESS 27–30 (2002) (discussing Lear’s coining of the word “runcible”).

⁸⁵ Cary O’Neill, Dick Houtman & Stef Alpers, *Advertising Real Beer: Authenticity Claims Beyond Truth and Falsity*, 17 EURO J. CULTURAL STUD. 585, 587 (2014).

⁸⁶ David Grazian, *Demystifying Authenticity in the Sociology of Culture*, in ROUTLEDGE HANDBOOK OF CULTURAL SOCIOLOGY 168, 169 (Laura Grindstaff, John R. Hall & Ming-Cheng M. Lo eds., 2d ed. 2019).

⁸⁷ *Id.* at 168–69.

where it is crucial to the viability and durability of social media influencers and personalities.⁸⁸

But across these variations, certain commonalities emerge. In general we may define authenticity as a discursive construct connoting legitimacy and social value.⁸⁹ The apparent variance in its usage comes from application to a wide range of characteristics in a wide range of social circumstances.⁹⁰ Rather than existing as a static attribute, the concept of authenticity is situationally fluid, tying together a variety of meanings and values so as to appear congruent with particular desires and ideas across multiple domains.⁹¹ It is not a natural or native characteristic in any circumstance, but arises out of human interaction, imagination, and performance in every circumstance.⁹² Most importantly, it is not an inherent property of any object or occurrence, but arises from a confluence of social perception and cultural practices.⁹³

The attribution of authenticity is peculiarly a particular feature of modernity.⁹⁴ Authenticity as we presently know it is consistently identified as a consequence of Western individualism, and a reaction to industrialization, through which people situate meaning within personal narratives.⁹⁵ In a mobile and increasingly globalized environment, shared elements of community, such as work, belief, technology, and relationships, are detached from particular times and places.⁹⁶ Reference objects become fungible,

⁸⁸ See Brooke Erin Duffy & Emily Hund, *Gendered Visibility on Social Media: Navigating Instagram's Authenticity Bind*, 13 INT'L J. COMM'N 4983, 4985 (2019); Stuart Cunningham & David Craig, *Being "Really Real" on YouTube: Authenticity, Community, and Brand Culture in Social Media Entertainment*, 164 MEDIA INT'L AUSTL. 71, 72 (2017).

⁸⁹ Paul Frosh, *To Thine Own Self Be True: The Discourse of Authenticity in Mass Cultural Production*, 4 COMM'N REV. 541, 542 (2001).

⁹⁰ See Grazian, *supra* note 86, at 168.

⁹¹ Thurnell-Read, *supra* note 50, at 1463; Brian Moeran, *Tricks of the Trade: The Performance and Interpretation of Authenticity*, 42 J. MGMT. STUD. 901, 914 (2005).

⁹² Grazian, *supra* note 86, at 169.

⁹³ *Id.*

⁹⁴ Sharon Zukin, *Consuming Authenticity: From Outposts of Difference to Means of Exclusion*, 22 CULTURAL STUD. 724, 728 (2008).

⁹⁵ Richard Handler, *Authenticity*, 2 ANTHROPOLOGY TODAY 2, 3 (1986).

⁹⁶ Eric J. Arnould & Linda L. Price, *Authenticating Acts and Authoritative Performances: Questing for Self and Community*, in *THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES* 140, 142 (S. Ratneshwar, David Glen Mick & Cynthia Huffman eds., 2003); see also Peter L. Berger, "Sincerity" and "Authenticity" in *Modern Society*, 31 PUB. INT. 81, 85 (1973) (explaining that the "rise of

and individuals are surrounded by repetitive instances of the same item.⁹⁷ Spatial and temporal dislocation, or deterritorialization, blend the objects, people, rituals, and practices that once distinguished discrete communities and traditions.⁹⁸ This destabilization of external narrative impacts perceptions of the individual self.⁹⁹ In this uncertain environment, consumers produce individual meaning through acts and performances that demonstrate the authenticity of the self.¹⁰⁰ In essence, people seek to construct new personal narratives.¹⁰¹

Thus, the appetite for authenticity is driven by attempts to overcome a personal sense of instability and displacement.¹⁰² Individuals in post-modernity employ personal narratives or “stories of the self” to position themselves in an environment that seems increasingly isolated and incoherent.¹⁰³ Personal identity is fostered and maintained through the capacity to perpetuate such self-narrative.¹⁰⁴ Some commentators have characterized this practice as “life [that] has become stagecraft,” in which individuals engage in performances depicting themselves.¹⁰⁵ These narratives of the “authentic self” facilitate an individual search for self-validation and community.¹⁰⁶ At the same time, they serve a liminal function to mark the difference between the self and others when current conditions have made such boundaries ambiguous.¹⁰⁷ The assignment and assertion of authenticity thus constitute a means for staking claims, making judgments, and demonstrating

modern institutions” and “rationalization of economic life” have shattered the symmetry between “reality of the self and the reality of the social world”).

⁹⁷ See Moeran, *supra* note 91, at 914.

⁹⁸ Arnould & Price, *supra* note 96, at 143.

⁹⁹ See *id.*

¹⁰⁰ Randall L. Rose & Stacy L. Wood, *Paradox and the Consumption of Authenticity Through Reality Television*, 32 J. CONSUMER RSCH. 284, 287 (2005)

¹⁰¹ See Arnould & Price, *supra* note 96, at 144.

¹⁰² *Id.*

¹⁰³ *Id.* at 140.

¹⁰⁴ See ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 54 (1991); Richard Handler & William Saxton, *Dyssimulation: Reflexivity, Narrative, and the Quest for Authenticity in “Living History,”* 3 CULTURAL ANTHROPOLOGY 242, 250 (1988).

¹⁰⁵ Rose & Wood, *supra* note 100, at 284.

¹⁰⁶ See Arnould & Price, *supra* note 96, at 141.

¹⁰⁷ See *id.* at 159.

preferences in human relationships; not only relationships to one another, but relationships to social surroundings.¹⁰⁸

In this form, the assignment of authenticity serves to re-establish relationships between consumers, producers, and products.¹⁰⁹ As already noted, the assignment need not be, and typically is not, consistent across contexts.¹¹⁰ For example, dining at a McDonald's fast-food restaurant may constitute an "authentic" experience in some registers, while being entirely "inauthentic" in others. It may be considered "authentic" for some types of discourse, in the sense of being a commonplace, unpretentious, and widely shared experience; the politician who eats at McDonald's demonstrates the authenticity of his tastes and habits to connect with those of the voting public.¹¹¹ A meal at McDonalds may contrariwise be entirely inauthentic in other contexts, such as amid discourses that consider authentic food to constitute natural, unrefined, artisanal, or minimally processed cuisine.¹¹² The American tourists who seek out McDonalds in Tokyo or Berlin cannot be said to have had an authentic Japanese or German dining experience, except to the extent that they might say they have then authentically experienced the conception of American cuisine held by those living outside the U.S.—wheels within wheels.

2. *Authentic Commodities.* From this perspective, authenticity subsists not in a verifiable objective characteristic of items or experiences, but instead arises from the individual infusing an item or experience with this characteristic.¹¹³ Much of this process

¹⁰⁸ See ANDREW POTTER, *THE AUTHENTICITY HOAX: HOW WE GOT LOST FINDING OURSELVES* 13 (2010).

¹⁰⁹ Thurnell-Read, *supra* note 50, at 1450–51.

¹¹⁰ See *supra* note 90 and accompanying text.

¹¹¹ See Helene A. Shugart, *The Ugly Truth: Abject Corporeality as Political Authenticity*, 31 *COMMC'N THEORY* 277, 287–88 (2021) (noting the consumption of "lowbrow" fast food by presidential candidate Donald J. Trump as a mark of political authenticity); see also Fiona Kennedy & Darl G. Kolb, *The Alchemy of Authenticity: Lessons from the 2016 US Presidential Campaign*, 45 *ORG. DYNAMICS* 316, 320 (2016) (contrasting the perceived culinary authenticity of billionaire Donald J. Trump with that of his political rival Hillary Rodham Clinton).

¹¹² See Sine Heitmann, Peter Robinson & Ghislaine Povey, *Slow Food, Slow Cities and Slow Tourism*, in *RESEARCH THEMES FOR TOURISM* 114 (Peter Robinson, Sine Heitmann & Peter U. C. Dieke eds., 2011) (describing culinary and travel trends that reject mass consumption in favor of local and sustainable consumption).

¹¹³ See Erik Cohen, *Authenticity and Commoditization in Tourism*, 15 *ANNALS TOURISM RSCH.* 371, 378 (1988)

sounds in a form of fetishism; individuals will frequently seize upon commodities as tokens or vehicles for self-expression, using them to fix points of security and order in the fragmented social landscape of modernity.¹¹⁴ In such actions, productive consumption of the commodity allows the individual to manufacture the sense of authenticity by “marshalling [] symbolic meanings, cultural value and affective attachments.”¹¹⁵ The authenticated commodity provides to the individual a nexus or focal point that makes visible newly structured relationships between communities, locations, and objects.¹¹⁶

Because industrialized production is frequently coded as “inauthentic,” the commodities chosen by individuals to construct the narrative self may be contrary goods that are rare, unusual, or distinctive.¹¹⁷ Mass production and re-production, especially when coupled with the capability to mimic nearly any composition or appearance, shifts commodity value toward intangible origins or associations.¹¹⁸ Consequently, one common version of constructing an individual counternarrative appears as a fascination with “artisan” or “craft” production, which may serve as a counterweight to alienation experienced in mass culture.¹¹⁹ These commodities often lend themselves to social performance and narrative that characterize them as “authentic.”¹²⁰ Because it can be characterized as a departure from impersonal mass production, craft production provides a redemptive narrative incorporating themes of personal control and self-actualization.¹²¹ Thus, in this register, authenticity becomes “a form of cultural discrimination projected onto objects.”¹²²

¹¹⁴ See Brian Spooner, *Weavers and Dealers: The Authenticity of an Oriental Carpet*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVES* 195, 226 (Arjun Appadurai ed., 1986) (“In seeking authenticity people are able to use commodities to express themselves and fix points of security and order in an amorphous modern society.”).

¹¹⁵ Thurnell-Read, *supra* note 50, at 1462.

¹¹⁶ See *id.* at 1464–65.

¹¹⁷ See *id.* at 1450.

¹¹⁸ See Richard A. Peterson, *In Search of Authenticity*, 42 *J. MGMT. STUD.* 1083, 1094 (2005).

¹¹⁹ See Thurnell-Read, *supra* note 50, at 1451 (linking the resurgence in craftwork with “concerns about re-establishing connections and engagements between products, consumers and producers beyond rational market exchange”).

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² Spooner, *supra* note 114, at 226.

This dynamic is key to the production and valuation of what have been called “enrichment commodities,” which constitute commodities that are valued for their narrative associations rather than for their physical composition or attributes.¹²³ Craft or artisan goods provide one example, but any commodity, such as historic housing or collectible antiques, that gains value by its “exceptional” associations may fall into this category.¹²⁴ These goods stand in contrast to the mass production of standardized objects that are valued based on their use.¹²⁵ Commodities with identical characteristics or physical features typically lack the kind of narrative connection that provides enrichment value.¹²⁶ Such enrichment value employs narratives that highlight particular features of the goods in order to construct the differences and distinctions that create commodity identity.¹²⁷ And, given the authenticity relationships identified above among people, places, and objects, narrative identification lends itself to enrichment not merely of the commodity itself, but of the people and circumstances surrounding the commodity.¹²⁸

3. *Mass-Market Commodities.* But in addition to artisan or craft production, industrial production may also play a role in the construction of self-narratives. The role of mass market commodities, which are key to our inquiry here, is particularly paradoxical in this respect. We have already observed that a social environment permeated by identically replicated goods helps drive the desire for distinction through narratives of authenticity. In this environment, authenticity becomes a key component in constructing the self because of its scarcity; it is valued in surroundings where mass production of goods and standardized social practice makes distinction rare and even implausible.¹²⁹ Thus

¹²³ Luc Boltanski & Arnaud Esquerre, *The Economic Life of Things: Commodities, Collectibles, Assets*, 98 NEW LEFT REV. 31, 35 (Matthew Cunningham trans., 2016).

¹²⁴ *Id.* at 33–34; *see also* Zukin, *supra* note 51, at 729 (characterizing historic neighborhoods as “authentic spaces” for the wealthy to perform intentional marginalization from consumer culture).

¹²⁵ Boltanski & Esquerre, *supra* note 123, at 37–38.

¹²⁶ *See id.* at 40–41 (contrasting “collection form,” which assigns value to objects based on their connection to the past, with standardized production).

¹²⁷ *See id.* at 35.

¹²⁸ *See id.* at 33.

¹²⁹ Rose & Wood, *supra* note 100, at 286; *see also* Adler, *supra* note 69, at 54 (suggesting that authenticity provides a constructed scarce resource in a world of information excess).

the need for authenticity is driven by the need for distinction among the abundance of fungible consumptive objects generated in an industrial society.¹³⁰ Yet, the assignment of authenticity carries within it an inherent tension: persons, objects, and acts are implicitly judged against a template regarded as authentic, but at the same time, the person, object, or act must be in some sense distinctive because rote imitation or reproduction of the template itself is typically judged inauthentic.¹³¹

Consequently, what is regarded as artificial and what is regarded as genuine is often a matter of “emergent authenticity” that arises from socially negotiated agreement regarding the perception of legitimacy.¹³² This is apparent for example in the case of artifacts heralded as “authentic reproductions,” which although identical and numerous, are limited to copies with a narrative connection to a particular time, place, or person¹³³—copies that may be signed, numbered, endorsed, manufactured according to a particular method, or manufactured at a particular location.

However, the same principle applies to mass-marketed commodities lacking such indicia, which can still be integrated into personal narratives when imbued with personalized meanings.¹³⁴ Consumption of commercial goods, particularly branded commercial goods, may be channeled into production of individual identity by linking an object or experience to personal narrative.¹³⁵ For example, mass branded commodities may become incorporated into personal practice or traditions such as holiday celebrations, becoming hallmarks of individual associations with those rituals.¹³⁶

These examples demonstrate that, perhaps ironically, authenticity may be infused even into the industrialized goods and services that alienate the individual in the first instance. The differing categories and valences of the commodities chosen for authentication also reveal that the nature of the objects themselves

¹³⁰ See Spooner, *supra* note 114, at 226.

¹³¹ See Peterson, *supra* note 118, at 1093 (describing authenticity and creative voice as “contradictory elements”).

¹³² See Catherine M. Cameron & John B. Gatewood, *The Authentic Interior: Questing Gemeinschaft in Post-Industrial Society*, 53 HUM. ORG. 21, 23 (1994) (defining “emergent authenticity” as a “negotiated agreement about what is perceived as genuine”).

¹³³ See Boltanski & Esquerre, *supra* note 123, at 410.

¹³⁴ Arnould & Price, *supra* note 96, at 150–51.

¹³⁵ *Id.* at 149.

¹³⁶ *Id.* at 154–55.

is largely irrelevant in this role. Rather, the authenticity of a particular object or experience lies not in its intrinsic features, but is primarily a question of the narratives and relationships attached to the commodity.¹³⁷ Commodities become authentic when acting as semiotic indices, pointing to distinctive people, places, or events that they represent.¹³⁸ Crucial to our consideration here, authenticity may be conferred in the course of cultural production in order to create prestige, status, or value.¹³⁹ This is true whether we are considering fast food or slow food; industrially produced products or craft commodities.¹⁴⁰ Ultimately, authenticity constitutes an expression of ontological fidelity to a particular discursive ideal.¹⁴¹

IV. THE ONCE AND FUTURE ROLE OF IP

As we have now seen, it seems likely that proliferation of automated, synthetic creativity will drive demand for human creativity that is considered authentic, and we have a sense of what such authenticity, prompted by advancing automation, entails. When attempting to situate the advent of synthetic creativity within a popular turn toward authenticity, the rather large body of literature that explores such sentiment as a reaction to industrialization and to the displacement of human labor places us in somewhat familiar territory. Such authenticity is a social construct, the social work of individuals building “narratives of the self” in dialog with practices of commodities and consumption.¹⁴²

However, we *are* required to break some new ground in considering such authenticity in the context of intellectual property law. If the deployment of synthetic creativity prompts greater valuation of authenticity, then a core research question at the intersection of IP and AI must be understanding what role intellectual property law has in promoting or preserving such

¹³⁷ See Stiles et al., *supra* note 51, at 226 (“All food, even a McDonald’s cheeseburger, derives its authenticity by prioritizing certain connections or social relations over others.”).

¹³⁸ See Rose & Wood, *supra* note 100, at 284.

¹³⁹ Grazian, *supra* note 86, at 169.

¹⁴⁰ See Stiles et al., *supra* note 51, at 225 (“A cheeseburger, like any item of food, is a complex set of relations, social and environmental.”).

¹⁴¹ Frosh, *supra* note 89, at 542.

¹⁴² See *supra* section III.A.

value.¹⁴³ Based on our review of justifications for “substantive IP,” we may expect at a minimum that the changes accompanying synthetic creativity will shift the emphasis in IP away from patent and copyright law, which are conceived primarily as exclusive rights against appropriation, and which have relatively little to do with the question of authenticity.

A. SHIFTING IP REGIMES

Certainly, mediating this type of value is not the incentive role that we typically recognize and advocate for patent and copyright. Patent and copyright are directed toward innovation, to the production of new creative works. Authenticity, in contrast, is generally directed *away* from innovation, toward an ideal of stability, measured by traditional or familiar templates.¹⁴⁴ Authenticity typically values preservation of narratives centered around established, typical, known practice. Rote repetition of established or familiar practices may lose the denomination of authenticity, but adherence to certain expectations is nonetheless required. Even when an “authentic” French chef develops a new dish, or an “authentic” gangsta rapper produces a new song, they are judged to be authentic for conforming to some prior set recognized conventions.

This is not to say that social narratives are absent from these modes of IP. I have argued elsewhere that patents likely play a role in mediating the social narrative of calculated exchange, and certainly some patent holders might use them as markers of innovative authenticity.¹⁴⁵ Relatedly, Jessica Silbey has shown the importance of narrative coherence in authenticating patent (and other intellectual property) claims.¹⁴⁶ But the coherence or attributions of patented subject matter are largely orthogonal to the authenticity of origin that concerns us here. Similarly, copyright might be conceived in some sense as a mediator of narrative, but

¹⁴³ Cf. Beebe, *supra* note 54 at 387 (arguing “that a primary role of intellectual property in a post-scarcity society will be to perpetuate consumption-based social difference by facilitating the creation of various forms of artificial scarcity”)

¹⁴⁴ See Peterson, *supra* note 118, at 1093 (discussing the tension between authenticity and originality in the country music genre).

¹⁴⁵ See Dan L. Burk, *Calculative Patents*, 99 TEX. L. REV. ONLINE 183, 194–95 (2021).

¹⁴⁶ See Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 319–20 (2008).

this is typically mediation of the internal, diegetic narrative of creative works.¹⁴⁷ Because copyright is famously adverse to exclusivity for the ambient epistemic indicia we deem “facts,” it constitutes a poor vehicle for historical, personal, existential narratives.¹⁴⁸ Indeed, the so-called “copyright estoppel” doctrines police spillovers from diegetic structure by treating diegetic facts as historical facts when they are represented as such.¹⁴⁹

Admittedly, copyright has at times been dragooned into guaranteeing external authentication, leveraging the statutory authority associated with the copyright author. Various plaintiffs have at times attempted to use copyright to control personal narrative, effectively substituting copyright claims for privacy claims that might have been unavailing.¹⁵⁰ In some cases, copyright infringement has been asserted to moderate the public narrative surrounding prominent figures such as Howard Hughes or J.D. Salinger, by suppressing publication of materials in which there may be a public interest.¹⁵¹ In other cases, such claims have attempted to deter the creation of a public narrative in which there was no prior public interest, for example by suppressing publication of intimate photos of the victims of “revenge porn.”¹⁵² In either case, as multiple commentators have pointed out, such wresting of the copyright statute sits uncomfortably with the incentive justification that generally animates it.¹⁵³

¹⁴⁷ See Dan L. Burk, *Copyright and Hypernarrative*, 31 L. & LITERATURE 1, 12–13 (2018) (discussing diegetic coherence under copyright).

¹⁴⁸ See Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 57–61 (2007) (distinguishing copyright’s treatment of historical and created facts).

¹⁴⁹ See Dan L. Burk, *Method and Madness in Copyright Law*, 2007 UTAH L. REV. 587, 595 (reviewing copyright estoppel).

¹⁵⁰ See, e.g., Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, BYU L. REV. 929, 936.

¹⁵¹ See generally Kate O’Neill, *Copyright Law and the Management of J.D. Salinger’s Literary Estate*, 31 CARDOZO ARTS & ENT. L.J. 19 (2012) (discussing copyright claims asserted by J.D. Salinger); Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–58 (2015) (discussing copyright claims asserted by Howard Hughes).

¹⁵² Margaret Chon, *Copyright’s Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 376 (2016).

¹⁵³ Goldman & Silbey, *supra* note 150, at 939; Wendy J. Gordon, *Copyright Owners’ Putative Interests in Privacy, Reputation, and Control: A Reply to Goold*, 103 VA. L. REV. ONLINE 36, 47 (2017); Chon, *supra* note 152, at 365.

Thus, while we may expect that intellectual property law will continue to play a role in fostering creative works, we should increasingly look to those regimes of intellectual property that are oriented away from innovation toward custom, convention, or identification. Those forms of intellectual property that best facilitate producer appropriation of consumer-constructed narratives can be expected to gain additional prominence. Certain types of intellectual property outside the “substantive” IP regimes may better facilitate such control of narrative. For example, one such regime might lie in rights of publicity, which facilitates control of the commercial narrative around a recognized or celebrated individual by tying products and services to the reputation or persona of a given public figure.¹⁵⁴

Looking more broadly, as my example of “New York” bagels above suggests,¹⁵⁵ geographic indications or appellations of origin immediately present themselves as legal guarantors of origin or provenance, and so potentially of authenticity.¹⁵⁶ Such indicators are intended to uniquely identify goods and services with a particular established reputation, even when an identical (or superior) product can be produced elsewhere, using different, often modernized methods of production.¹⁵⁷ And, although ostensibly territorial, such indications are on closer examination generally less associated with geography than they are with particular communities and “authentic” practices that may be related to geography.¹⁵⁸ Similarly, legal protections for traditional knowledge may lend themselves to certification of constructed authenticity in the sense we have identified, by maintaining the integrity or

¹⁵⁴ See Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Right of Publicity*, 20 COLUM. J.L. & ARTS 123, 124–27, 130, 145–46 (1996) (examining expressive cultural interests hampered by expanded rights of publicity); see generally JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (discussing the origins of the right of publicity).

¹⁵⁵ See *supra* notes 81–83 and accompanying text.

¹⁵⁶ Heymann, *supra* note 79, at 30–32; Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. (forthcoming 2023) (discussing appellations of origin as a strategy to commercially exploit authenticity).

¹⁵⁷ See Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications*, 58 HASTINGS L.J. 299, 316, 365–66 (2006); Heymann, *supra* note 79, at 40–41.

¹⁵⁸ Heymann, *supra* note 79, at 36.

stability of established practices.¹⁵⁹ Significantly, such protections are often intended to guard artisan or craft goods against competition from industrialized processes.

And although I have distinguished the role of copyright itself in addressing authenticity,¹⁶⁰ copyright's related regimes of moral rights may be salient to the validation or certification of authenticity. Authorial moral rights are recognized by the majority of international jurisdictions, although they are largely absent from the federal copyright system in the United States.¹⁶¹ Typically, such rights include rights of attribution that ensure a creator's name is associated with her work in the fashion she desires.¹⁶² Moral rights of integrity are also common, ensuring that the form of the work is not altered or amended against the wishes of the creator.¹⁶³ By relating a work to its origins, these features could lend themselves to authentication.

B. TRADEMARK AUTHENTICATION

Each of these regimes deserves detailed consideration within the prospects for synthetic creativity, and those explorations must be part of the research agenda for intellectual property going forward. However, within the constraints of this Article, I will focus my attention on a single prominent example of certification, the trademark regime. Trademark law is the form of intellectual property that may be the most readily associated with certification of authenticity, ensuring a valid link between products and a particular source.¹⁶⁴ Thus, as explored in some detail below, it is largely justified as a mechanism to mitigate consumer search costs and build supplier's reputational capital.

But trademark may also serve to create value by validating preferred associations with a product or service. Barton Beebe has

¹⁵⁹ See Ruth L. Okediji, *A Tiered Approach to Rights in Traditional Knowledge*, 58 WASHBURN L.J. 271, 297–98 (2019).

¹⁶⁰ See discussion *supra* notes 148–153.

¹⁶¹ See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 17 (1985).

¹⁶² Roberta R. Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 986 & n.6 (2002).

¹⁶³ See Kwall, *supra* note 161, at 8.

¹⁶⁴ See Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 109 (2009).

cannily observed that modern trademark law acts sometimes like a contemporary sumptuary code, restricting the availability of luxury goods, creating an artificial scarcity that ensures that even where goods of identical quality could be provided on a mass basis, only the wealthy sport luxury brands.¹⁶⁵ In the face of synthetic creativity, I suggest that trademark may come to support a somewhat orthogonal marketing position, fostering an artificial scarcity that identifies otherwise indistinguishable goods produced by human creativity rather than AI generativity.

This is not how we have typically thought of trademarks. Unlike the rationales for patent or copyright law discussed previously, trademark law ostensibly entails a distinct component of consumer protection.¹⁶⁶ The usual justification for trademarks supposedly addresses the problem of consumer confusion; trademarks are justified on the concern that consumers may be intentionally or unintentionally misled into inadvertently purchasing goods that seem identical or confusingly similar to goods the consumer actually sought.¹⁶⁷ The trademark is intended to connect the goods to a particular source of production so that consumers can rely on the mark to ensure uniformity of source.¹⁶⁸ This rationale has been closely tied to the economic theory of search costs, to the idea that identifying and locating desired goods is a costly endeavor, and properly enforced trademark law can lower such consumer costs.¹⁶⁹

Such rationales are also closely related to the type of goods contemplated. Economists divide goods into inspection goods, experience goods, and credence goods.¹⁷⁰ The characteristics of the first category may be determined by the consumer on examination,

¹⁶⁵ See Beebe, *supra* note 58, at 814–16.

¹⁶⁶ See Michael Grynberg, *More than IP: Trademark among the Consumer Information Laws*, 55 WM. & MARY L. REV. 1429, 1434 (2014) (characterizing trademark law as a type of consumer notice and protection regime). *But see* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1866 (2007) (arguing that despite its consumer confusion rationale, trademark law is grounded in producer rather than consumer protection).

¹⁶⁷ See Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2106 (2004).

¹⁶⁸ Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 76 (2012).

¹⁶⁹ *Id.* at 74–76.

¹⁷⁰ WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 284 (1987).

as in the case of fresh produce.¹⁷¹ The second category requires some period of use before the quality of the goods becomes apparent, as in the case of an automobile or toothbrush.¹⁷² The final category of goods cannot be judged either by inspection or experience, and so the consumer is forced to rely upon the representations made about the quality and origin of the good—perhaps a surgical procedure or a will.¹⁷³ In the last category, the consumer is entirely dependent on the assessment or reputation of an expert provider.¹⁷⁴ As might be expected, trademarks as an indicator of source and quality are relatively unimportant for inspection goods, more important for experience goods, and critical in the case of credence goods.¹⁷⁵

Consumers are particularly at the mercy of trademark and associated credence signals where the desirable characteristics of particular goods lies in their origin or provenance—outside the consumer’s ability to reasonably ascertain. The consumer has no way of knowing if meat was processed according to kosher standards, or if pasta was in fact imported from Italy, or if coffee was grown according to “fair trade” labor standards. This same ambiguity inheres in the case of goods generated via synthetic creativity. Should a consumer prefer to acquire goods designed or crafted by human artisans, design origin may not be apparent on inspection or experience—synthetic creativity may be indistinguishable, indeed may be intended to be indistinguishable, from human creativity in a final product. Accurate marking and branding of what are likely to be credence goods may be essential to acquisition of goods that are not AI knock-offs of human creativity. (And, of course, the inverse might be true of consumers who prefer machine-generated goods to those created by humans.) As the development of machine learning systems progresses, it may be increasingly difficult for consumers to know from inspection of the goods how they originated.

It is critical to realize that these justifications suggest that trademark law might be thought to address authenticity, but none

¹⁷¹ *Id.*

¹⁷² Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

¹⁷³ LANDES & POSNER, *supra* note 170, at 284–85.

¹⁷⁴ See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON 67, 69 (1973).

¹⁷⁵ See Tom W. Bell, *Virtual Trade Dress: A Very Real Problem*, 56 MD. L. REV. 384, 407–08 & n.143 (1997).

of them address authenticity in the sense that we have defined it above. Rather, these rationales address the question of veracity. Under these rationales, trademarks are intended to ensure that goods and services in fact proceed from a particular source, or at a minimum are authorized by a source that coincides with consumer expectations.¹⁷⁶ These rationales do not explicitly address issues of self-narrative or consumer identity—the word “Nike” and accompanying visual swoosh symbol are as a matter of trademark law intended to ensure that any goods so marked proceed from a common entity, and not to ensure how consumers identify with or think about such goods.¹⁷⁷

To be sure, these explanations for trademark law help to ensure or preserve characteristics, particularly unobservable characteristics, to which authenticity may be attached—what some have termed the “material authenticity” of the brand.¹⁷⁸ Goods may not be perceived as authentic in the sense of cultural construction if they are not genuine in the sense of trademark source. In the case of artificial creativity, trademark certification of source may help consumers identify goods that were (or were not) generated by a human as opposed to generated by machine, and attributing authenticity to that origin. But the standard justifications of trademark leave unaddressed the value or cultural significance consumers attach to such characteristics.

1. *Branding and Self-Narrative.* An alternative and more contemporary theory of trademark infringement, dilution, sidesteps the question of consumer confusion to focus on the reputational investment of trademark owners.¹⁷⁹ Dilution prohibits the use of identical or similar marks for famous brands in situations where consumers would not necessarily mistake the infringing use for identical or even related goods.¹⁸⁰ Rather, the use of diluting marks is said to impair the market impact or perception of a famous brand, by distracting consumers from associations with the genuine goods.

¹⁷⁶ See Grynberg, *supra* note 166, at 1434–35.

¹⁷⁷ See *id.*

¹⁷⁸ See Valerie Gannon & Andrea Prothero, *Authenticity in Material Culture, Consumption and Branding*, in *CULTURES OF AUTHENTICITY* 79, 80–82 (Michael Skey & Thomas Thurnell-Read eds., 2022).

¹⁷⁹ See Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1033–34 (2006).

¹⁸⁰ See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 676 (2004).

The related claim of tarnishment attempts to similarly deter the formation of negative associations that might impair the mark's impact.¹⁸¹

Claims of dilution or tarnishment, concerned as they are with consumer perception, are somewhat more amenable to formulation as a matter of social authenticity. By allowing producers a measure of control over preferred associations, these doctrines may lend themselves to shaping of product narrative by producers. Certainly some commentators have noted that trademark holders have attempted to stretch these actions in the direction of narrative control.¹⁸² But neither type of claim concerns itself directly or substantially with authenticity in the sense that concerns us here. These claims are again grounded in veracity: the attachment of authorized goods and services to a genuine source of origin.¹⁸³ They do not address directly the development of cultural significance, self-narrative, or constructed meaning entailed in product authenticity.

Admittedly, as a matter of producer reputational control, Professor Beebe has noted that trademark dilution, along with geographical indications and similar forms of producer certification, allow producers to artificially restrict production in the face of cheap copying technology, particularly technologies that maintain quality while reducing marginal costs.¹⁸⁴ This effectively generates a system of class and wealth based distinctions, where everyone in theory could possess a fashionable high-quality handbag, but only those with the means to purchase, for example, Chanel or Louis Vuitton branded bags merit this distinction.¹⁸⁵ This is an important and salient insight that adds a dimension of social construction to the story of falling marginal costs related above.¹⁸⁶ But this observation engages at best only a facet of personal narrative co-creation. Beebe notes that distinction of consumption is well-studied

¹⁸¹ Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1150 (2006).

¹⁸² David Tan, *De(Re)Constructing Narratives in Intellectual Property Law: Transformative Play, Culture Jamming, and Poststructural Disruptions*, 32 L. & LITERATURE 75, 97 (2019); Silbey, *supra* note 146, at 367.

¹⁸³ See Silbey, *supra* note 146, at 362, 364 (noting that trademark narratives are confined to authenticity of source).

¹⁸⁴ Beebe, *supra* note 58.

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 22–25 and accompanying text.

in the formation of personal and community identity,¹⁸⁷ but does not consider the dynamics surrounding attributions of authenticity, which are as likely to attach to low-cost, high volume White Castle “sliders”¹⁸⁸ as they are to genuine, locally sourced, and expensive haute cuisine.

The advent of synthetic creativity thus highlights a massive discontinuity in current trademark doctrine. Commercial developers of modern marketing and branding are well aware of the principles outlined above regarding authenticity and the development of self-narratives.¹⁸⁹ As we have already noted,¹⁹⁰ mass-produced commodities can and often are incorporated into such self-narrative, providing a form of personal distinction around which the authentic self may be structured. This is in fact the basis for all modern marketing strategy. As described by Arvidsson and others, the trajectory of marketing strategy has over past decades moved from describing qualities of commodities to consumers in order to allow them to identify desirable products, to convincing consumers they have a need or desire for the qualities of a given commodity, to persuading consumers that a given commodity entails a desirable experience, to assuring consumers that a given commodity connects them to a suitable community of product users.¹⁹¹

The more recent strategies in this progression are clearly grounded in the practices of consumer self-narrative and authenticity. Marketing strategists incorporate into their branding the circumstances surveyed above regarding social construction of authenticity and intentionally position their products and services to become icons or tokens of consumer identity, around which

¹⁸⁷ See Beebe, *supra* note 58, at 820–24.

¹⁸⁸ See David Gerard Hogan, SELLING ‘EM BY THE SACK: WHITE CASTLE AND THE CREATION OF AMERICAN FOOD 173 (1997) (detailing the use of the affectionately derogatory term “slider” for White Castle hamburgers); see generally Dave Hogan, *White Castle: How Billy Ingram Made Hamburger “The America’s Choice,”* 4 J. REST. & FOODSERVICE MKTG. 123 (2001) (summarizing the history of White Castle’s general public mass-marketing).

¹⁸⁹ See Bechtold & Sprigman, *supra* note 156 (examining IP strategies adopted by firms in exploiting consumer authenticity).

¹⁹⁰ See *supra* text accompanying notes 179–181.

¹⁹¹ See generally AVRAM ARVIDSSON, BRANDS: MEANING AND VALUE IN MEDIA CULTURE 43–59 (2006) (surveying the evolution of marketing theory).

consumers build narratives of the self.¹⁹² Consumers are encouraged to drink “the real thing,”¹⁹³ to share in a global community and “buy the world a Coke,”¹⁹⁴ or alternatively to “be a Pepper”¹⁹⁵ or “join the Pepsi people.”¹⁹⁶ Commodity marketing goes to great lengths to shape and encourage consumer narratives centered on the commodity. The legally protected trademark is the coalescence and focal point of such narratives. But trademark law does not formally concern itself with the producer’s investment in consumer community and narrative. Trademark law is supposed to intervene only when the consumer is confused or misled with regard to a product’s source, not when consumer narratives concerning the product have gone unexpectedly awry.

2. *Recasting Trademark Authenticity.* Thus, of Arvidsson’s strategies for commodity marketing noted above,¹⁹⁷ trademark law persistently concerns itself almost exclusively with the first, which has been long since superseded in history and practice. Twenty-first century trademark doctrine remains focused on nineteenth and early twentieth century marketing criteria. Producers are looking for tools to foster and control product narratives, while black-letter trademark law remains dedicated to facilitating product identification and consumer search. This disjunction between the current practice of branding and the goals of trademark protection largely explains the frequently lamented expansion of trademark

¹⁹² See Gannon & Prothero, *supra* note 178, at 84 (“Consumers are viewed as seeking authenticity, and brands have responded by presenting it.”); Detlev Zwick, Samuel K. Bonsu & Aron Darmody, *Putting Consumers to Work: “Co-creation” and New Marketing Govern-Mentality*, 8 J. CONSUMER CULTURE 163, 163 (2008) (arguing that modern marketing recognizes the value of the consumer “co-creation”); Adam Arvidsson, *Brands: A Critical Perspective*, 5 J. CONSUMER CULTURE 235, 247 (2005) (discussing consumer involvement in adding “a dimension of trust or authenticity” to a brand).

¹⁹³ See Joanna K. Love, *Coke and the Hilltop*, in *DECODING COCA-COLA: A BIOGRAPHY OF A GLOBAL BRAND* 33, 40–41 (Robert Crawford, Linda Brennan & Susie Khamis eds., 2021) (discussing Coca-Cola’s slogan branding strategy).

¹⁹⁴ See *id.*; Güliz Ger & Russell W. Belk, *I’d Like to Buy the World a Coke: Consumptionscapes of the “Less Affluent World,”* 19 J. CONSUMER POL’Y 271, 272 (1996).

¹⁹⁵ See Joseph T. Plummer, *How Personality Makes a Difference*, 40 J. ADVERT. RES. 79, 83 (2000) (discussing Dr. Pepper cola slogan branding strategy).

¹⁹⁶ See Mădălina Moraru, *The “Positioning” Concept and the Fight Between Two Well Known Brands Coca-Cola and Pepsi*, 3 J. MEDIA RES. 47, 59 (2010) (discussing Pepsi’s slogan branding strategy).

¹⁹⁷ See *supra* note 191 and accompanying text.

law to situations that have little to do with consumer confusion.¹⁹⁸ Despite the repeated mantra of “confusion” and “source,” trademark doctrine is being continually stretched and manipulated to try to fit modern branding practices.¹⁹⁹

And despite current branding practice, trademark law has never come to grips with its own dependency on producer appropriation of consumer labor. Intellectual property in the form of trademark, trade dress, and associated rights clearly has a central role to play in such marketing—not only in facilitating producer control over the narrative construction of product communities, but also in appropriating the formation of commodity meanings constructed by consumers.²⁰⁰ Indeed, as pointed out by some commentators in a somewhat Marxist vein, modern marketing may be viewed as a form of producer free-riding on the cultural work performed by consumers.²⁰¹ Even under standard trademark justifications, consumer recognition invests the mark with value, and trademark law allows trademark owners to appropriate and monetize that value.²⁰²

Thus, trademark law currently has little purchase on authenticity as we have defined it. If I experience a concert performance by the musical group Queen, without Freddie Mercury

¹⁹⁸ See Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 398 (1990) (noting that standard justifications for trademarks “have not kept pace” with trademark owner’s capitalization of the cultural significance of marks).

¹⁹⁹ See, e.g., Mark A. Lemley & Mark P. McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010) (arguing that courts have improperly expanded trademark liability beyond confusion as to source); Glynn S. Lunney Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 371–72 (1999) (decrying the reformation of trademark law as a species of property law).

²⁰⁰ See Silbey, *supra* note 146, at 363 (identifying the role trademark origin narratives in constructing personal identity).

²⁰¹ See BANET-WEISER, *supra* note 76, at 42–43 (elaborating on the role of “consumer coproduction” in creating brand cultures); ARVIDSSON, *supra* note 191, at 68; see also Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 450–51 (2010) (emphasizing the importance of consumer rather than producer investment in a trademark). Some evidence suggests that the expansion of trademark branding has benefitted capital at the expense of employee labor as well. See Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. 1, 1–2 (2022).

²⁰² See Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1734–35 (1999) (arguing that the persuasive force of brands should be viewed as “collectively owned” by producers and consumers).

as front singer, is it an “authentic” Queen experience?²⁰³ Is the taste of my cola drink “authentic” if the manufacturer has incorporated corn syrup sweetener rather than cane sugar?²⁰⁴ In each case, the substitution of an element of the commodity by the trademark holder is authorized, and there is no consumer confusion as to the source of the goods, but the propriety of the trademark sourcing does not guarantee authenticity. Control of the trademark prevents outside imitators from staging an inauthentic Queen performance, but there is nothing to prevent the trademark holders *themselves* from staging an inauthentic performance. Control of the trademark prevents a third party from selling a cola drink labelled “Dr. Pepper,” but there is nothing to prevent the trademark holder itself from marketing an inauthentically sweetened cola.²⁰⁵ The constitution of a commodity may be authorized by the trademark holder, but constitutive authenticity lies largely in the hands of the consuming public.²⁰⁶

It seems therefore clear that trademark law already needs restructuring to account for the use of marks to extract the social and cultural value of constructed authenticity. This is no surprise. It has been apparent for some time that trademark law is no longer a matter of search costs or consumer confusion (if indeed it ever was),²⁰⁷ and has for some time been on a trajectory toward a

²⁰³ See “*Is This Really Queen Without Freddie?*”: Brian May Defends Tour with Adam Lambert, SOMETHING ELSE! (Mar. 9, 2014), <https://somethingelsereviews.com/2014/03/09/is-this-really-queen-without-freddie-brian-may-defends-tour-with-adam-lambert/> (considering the nature of the rock band Queen with a new front singer).

²⁰⁴ See Anne Glusker, *The Story of Mexican Coke Is a Lot More Complex than Hipsters Would Like to Admit*, SMITHSONIAN MAG. (Aug. 11, 2015), <https://www.smithsonianmag.com/smithsonian-institution/story-mexican-coke-more-complex-than-hipsters-would-admit-1809-56032/> (reporting the preference of “foodies” for Mexican Coca-Cola sweetened with cane sugar); Benjamin Powell, *A Taste of Protectionism: Coca-Cola in the Classroom*, 23 J. PRIV. ENTER. 154, 154–55 (2007) (describing the trade quota incentives for sweetening U.S. bottled Coca-Cola with high fructose corn syrup).

²⁰⁵ See Mike Esterl, *Dr. Pepper v. Dr. Pepper: Sweet Business Turns Bitter*, WALL ST. J. (July 12, 2011), (describing the trademark dispute over Dr. Pepper franchisee’s distribution of “Dublin Dr. Pepper” cola produced with cane sugar rather than high fructose corn sweetener).

²⁰⁶ See Heymann, *supra* note 79, at 46–47.

²⁰⁷ See McKenna, *supra* note 168, at 84 (arguing that trademark search cost justifications are misguided); Lemley & McKenna, *supra* note 199, at 414 (“Trademark law has taken the concept of confusion too far.”); Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006) (arguing that preservation of producer goodwill forms a major component of trademark doctrine). Professor McKenna has

confrontation with itself over its conception of the consumer.²⁰⁸ The ongoing realignment of trademark doctrine by courts and by trademark owners to meet branding practice has been perceived as a market grab,²⁰⁹ and while market grabbing is surely one facet of trademark expansionism, this economic formulation surely misses the larger picture. A better and more complete formulation of the trend is to understand it as a bid for control and exploitation of consumer experience, and any reform must take that understanding into account.

Such a long-delayed reckoning would be a necessary step toward trademark mediation of the narrative valuations that will accompany the growing incidence of synthetic creativity. And it may be that the momentum supplied by synthetic creativity will itself be sufficient to force the moment to its crisis. When that moment comes, we would be wise to remember that law is a blunt instrument where socially constructed value is concerned. Professor Beebe, for example, argues that control of consumer identity would be enhanced by reforming intellectual property's separate attribution of producer reputation from control of production, perhaps including the abolition of trademark dilution and geographic indications.²¹⁰ While his prescription is not wrong, he admits that such reforms are infeasible.²¹¹ More to the point for present purposes, such reforms do not engage the culture of narrative co-creation that we have described above. And, as Professor Heyman notes, the law has little ability to enforce or require a particular social construction of authenticity, and attempts to use law in that fashion are likely to fail.²¹²

asserted for some time that the consumer confusion rationale for trademark was always a proxy for customer diversion. McKenna, *supra* note 166, at 1840–41; McKenna, *supra* note 164, at 72–74.

²⁰⁸ See, e.g., Laura Heymann, *Trademark Law and Consumer Constraints*, 64 ARIZ. L. REV. 339, 343–44 (2022) (observing that trademark law overlooks effects of consumer status and wealth); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2025 (2005) (observing that trademark law constructs the consumer as both rational and gullible).

²⁰⁹ See Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 148–49 (2010); Lunney, *supra* note 199, at 421.

²¹⁰ See Beebe, *supra* note 58, at 887.

²¹¹ See *id.*

²¹² Heymann, *supra* note 79, at 48; see also Adler, *supra* note 69, at 53 (observing that market norms, rather than legal doctrine, define authenticity in art).

But law may be useful to clear a space within which authenticity may be constructed, facilitating the healthy exercise of individual and communal narrative building.²¹³ To offer only one quick example, the transparency occasioned by trademark authorization to prevent fraud or mistake as to *source* may also be directed to facilitate consumer construction of *authenticity*. If in a museum I bask in the presence of a Van Gogh painting that is later shown to be an almost undetectable forgery, was my enjoyment of the painting inauthentic, even though at the time I believed I was appreciating the artistic vision and technique of the Dutch genius? If my Chanel handbag,²¹⁴ my Stetson boots, or my Levi's 501 blue jeans prove to be perfect but unauthorized knock-offs, is the self-narrative that I have constructed around such items threatened? Even if the tangible qualities of commodities are exactly what consumers would expect, misattribution of origin leads potentially to a type of fraudulent "aura" that might not have been attributed to the work under full disclosure of provenance. Thus, trademark certification of authentic origin might serve to deter a kind of "reverse dilution" that threatens consumer, rather than producer, identity.²¹⁵

V. CONCLUSION

The title of this Article consciously invokes Eugene Volokh's influential 1995 article in the *Yale Law Journal*, "Cheap Speech and What it Will Do."²¹⁶ Published at the inception of widespread consumer Internet access, Volokh presciently predicted many of the legal and social changes that such access would bring, due to the fall in marginal costs of distributing expression²¹⁷—an effect we have noted above with regard to copyright.²¹⁸ Of course, as Rick Hasen has more recently pointed out, Volokh did not foresee all the consequences of cheap speech, including many socially corrosive

²¹³ See Heymann, *supra* note 79, at 47.

²¹⁴ See Beebe, *supra* note 58, at 818 (describing the perfect facsimile of South Korean "super copy" goods).

²¹⁵ This is, again, a different consideration of a problem the converse of Professor Beebe's concern that trademark imposes artificial scarcity on a world of cheap reproduction. See *supra* note 165 and accompanying text.

²¹⁶ Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

²¹⁷ *Id.* at 1806–07.

²¹⁸ See *supra* note 25 and accompanying text.

effects.²¹⁹ Some of these omissions were due to unforeseen technological changes, such as the rise of social media platforms;²²⁰ others were due to unforeseen implications of institutional changes, such as the collapse of traditional media gatekeepers.²²¹ But Volokh's work was crucial in its time in refocusing our attention on the impact of easy and affordable personal access to mass communication.

As I have pointed out, the advent of synthetic creativity by means of AI systems takes us a step further than the dramatic drop of distributional costs occasioned by computer mediated communication. I cannot, and would not, claim to have predicted all the effects this shift portends. In particular, this analysis is limited to intellectual property—synthetic creativity no doubt will have other impacts on expressive conduct and the regulation of expressive conduct.²²² Additionally, I have focused my comments primarily on a single type of intellectual property, that of trademark and related rights. As I have indicated, similar investigations are in order for a range of other regimes that incorporate related authentication functions, such as rights of publicity, geographic indications, and traditional knowledge. And there will undoubtedly be unforeseen surprises along the way.

Nonetheless, I am comfortable in having identified at least one set of effects that will attend the increased deployment of AIs in generating new commodities. And I am quite confident that it is past time to refocus our attention away from the questions of authorship and ownership that are currently occupying academic and policy analyses. Rather, each of the modes of intellectual property that I have identified operates as a form of certification

²¹⁹ See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 202, 230–31 (2017) (“[T]he great freedom of information that Volokh rightly foresaw in the era of cheap speech is coming with a steep price for our democracy.”); see also Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2339–40 (2021) (assessing possible responses to detrimental cheap speech).

²²⁰ See RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* 67–74 (2022).

²²¹ See *id.* at 155–61.

²²² See, e.g., Margot Kaminiski, Toni Massaro & Helen Norton, *Siriously 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2483, 2504 (2017) (indulging in a gedankenexperiment regarding AI expression and expressive freedom).

rather than as a mode of creative incentive. Cheap, synthetic creativity will surely augment the importance of such certification. Patent and copyright incentives will not fall into desuetude; increased appropriability will remain a consideration. But as the marginal cost of initial creation falls, new emphasis will undoubtedly shift to intellectual property regimes that can certify human creative production. Patent and copyright have had the center stage in a world of cheap reproduction, but this may no longer be the case in a world of cheap creativity. Thus, a major goal of the future research agenda for IP scholarship must be coming to understand the role of the intellectual property and authenticity.