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### Social Media, Sharing, and Intellectual Property Law

Leah Chan Grinvald

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## SOCIAL MEDIA, SHARING, AND INTELLECTUAL PROPERTY LAW

THE MYTH OF THE CULTURAL JEW: CULTURE AND LAW IN THE  
JEWISH TRADITION. By Roberta Rosenthal Kwall. Oxford University  
Press, New York, 2015. xvii and 297 pages. Hard Back \$34.95

*Reviewed By: Leah Chan Grinvald\**

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## INTRODUCTION

It is hard to overstate the viral nature of social media.<sup>1</sup> Given that social media as we know it only began in 2002,<sup>2</sup> the statistics are staggering: approximately 73% of all American adults who are online use some form of social media.<sup>3</sup> With its widespread nature, it is only natural that social media has introduced new cultural norms, including the culture of “sharing.”<sup>4</sup> These days, everyone is sharing intimate details of their lives in an unprecedented manner. From where they are eating<sup>5</sup> and whom they are eating with,<sup>6</sup> to their work failures and successes<sup>7</sup>—we know more about our “friends,”<sup>8</sup> even as our interpersonal skills are on the decline.<sup>9</sup> All of this sharing has not gone to

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1. See JONAH BERGER, *CONTAGIOUS: WHY THINGS CATCH ON* 6 (2013). For those readers unfamiliar with social media, the use of the term “viral” is a bit tongue-in-cheek. “Viral” is a term used often to describe a video, photo, or idea that has spread through social media quickly, from one person to another. *Id.* at 6 n.\*.

2. See James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1144 (2009) (recounting how Friendster, which was established in 2002, is considered to be the first “prototypical” social media site).

3. MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., *SOCIAL MEDIA UPDATE 2013*, at 1 (2014), available at <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>.

4. See MAEVE DUGGAN, PEW RESEARCH CTR., *PHOTO AND VIDEO SHARING GROW ONLINE* 2 (2013), available at <http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online/> (reporting that at least 62% of all internet users have created or shared videos or photos through networking sites).

5. See *About Us*, FOURSQUARE, <https://foursquare.com/about> (last visited Feb. 11, 2015) (“In 2009, Foursquare launched the check-in and real-time location sharing with friends.”).

6. See *About Facebook*, FACEBOOK, [https://www.facebook.com/facebook/info?tab=page\\_info](https://www.facebook.com/facebook/info?tab=page_info) (last visited Feb. 21, 2014) (“Founded in 2004, Facebook’s mission is to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.”).

7. See *A Brief History of LinkedIn*, LINKEDIN, <http://ourstory.linkedin.com/> (last visited Feb. 11, 2015) (recounting that in 2006, LinkedIn launched public profiles, staking “its claim as the professional profile of record”).

8. See Courteney Palis, *5 Types of People You Should Never Friend on Facebook*, HUFFINGTON POST (May 28, 2012, 8:12 AM), [http://www.huffingtonpost.com/2012/05/18/5-people-avoid-facebook-friends\\_n\\_1528630.html](http://www.huffingtonpost.com/2012/05/18/5-people-avoid-facebook-friends_n_1528630.html).

9. See JANNA ANDERSON & LEE RAINE, PEW RESEARCH CTR., *DIGITAL LIFE IN 2025*, at 12 (2014), available at [http://www.pewinternet.org/files/2014/03/PIP\\_Report\\_Future\\_of\\_the\\_Internet\\_Predictions\\_031114.pdf](http://www.pewinternet.org/files/2014/03/PIP_Report_Future_of_the_Internet_Predictions_031114.pdf) (“Given there is strong evidence that people are much more willing to commit petty crimes against people and organizations when they have no face-to-face interaction, the increasing proportion of human interactions mediated by the Internet will continue the trend toward less respect and less integrity in our relations.”).

waste: many intellectual property holders are benefiting from our increased sharing of information. For example, the #AlexFromTarget meme<sup>10</sup> amplified the Target brand,<sup>11</sup> potentially persuading members of the users' social network to also shop there.<sup>12</sup> In addition to the financial benefits that intellectual property holders have experienced, ordinary citizens have also benefitted from social-media sharing with "mash-ups"<sup>13</sup> and user-generated content, such as the *Downfall* movie clip creations that engage use and build communities of interest.<sup>14</sup>

Unfortunately for users, intellectual property law has had a hard time catching up to the norms of sharing. This means that when the intellectual property holder objects to the appropriation, the law is a harsh tool that may be used to halt the sharing.<sup>15</sup> One of the reasons for this is that intellectual property law has traditionally been premised on the principle of exclusivity, at least for a defined period of years in patent and copyright law.<sup>16</sup> And intellectual property holders reinforce their exclusivity through lawsuits, threatened litigation, and legislative lobbying.<sup>17</sup> Their efforts, for the most part, have been ef-

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10. *Meme*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/meme> (last visited Apr. 1, 2015). A meme is "an idea, behavior, style, or usage that spreads from person to person within a culture." *Id.*

11. Cf. Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1505–08 (2012) (discussing how "[b]rands serve as permanent ties on social media sites" and how users on those sites "use[] brands to define [their] sense of self and construct a public persona").

12. See Maureen O'Connor, "Alex From Target" and the Mess of Uncontrollable Fame, N.Y. MAG (Nov. 6, 2014, 3:30 PM), <http://www.nymag.com/the-cut/2014/11/alex-from-target-fame.html>. In particular, teenage girls who would be interested in meeting good-looking guys, such as the teenager Alex from the meme. See *id.* Target jumped on the social-media bandwagon and tweeted, "We heart Alex, too! #alexfromtarget." TWITTER (Nov. 3, 2014, 7:47AM), <https://twitter.com/target/status/529298903896961025>. As of May 22, 2015, this tweet has been retweeted 28,046 times and favorited 46,505 times. *Id.*

13. "[M]ash-ups are compilations of pre-existing songs blended and spliced together to create an entirely new song." Anna Shapell, "Give Me a Beat:" *Mixing and Mashing Copyright Law To Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 519 (2012).

14. See generally Aaron Schwabach, *Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFFALO INTELL. PROP. L.J. 1, 2–4 (2012).

15. See generally Leah Chan Grinstead, *Policing the Cease-and-Desist Letter*, 49 U.S.F. L. REV. (forthcoming 2015), [hereinafter Grinstead, *Policing*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2515455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515455) (discussing the problem of overenforcement of intellectual property rights through abusive cease-and-desist letters). This is accomplished either through actual use of the law through lawsuits, or simply by threatening a lawsuit through an abusive cease-and-desist letter. See *id.*

16. U.S. CONST. art. 1, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

17. For example, two large intellectual property attorneys' organizations, the International Trademark Association (INTA) and the American Intellectual Property Lawyers' Association

fective in maintaining the status quo or even strengthening the laws.<sup>18</sup> Consequently, in spite of the sharing by some creators and innovators who may own intellectual property, the voices of objecting rights holders are heard louder than others.<sup>19</sup>

The problem with this attack on social media's sharing culture is that it may lead to a sterile and sycophantic world where the only shareable creations are approved by intellectual property holders.<sup>20</sup> Another possibility is that this attack on the sharing culture encourages more users to treat intellectual property laws as irrelevant. Either option would be a serious detriment to society. There are great societal benefits to social media's sharing culture, and at the same time, to intellectual property laws. But if intellectual property laws do not adapt, creativity, political action, social commentary, and criticism will all be stymied on social media, which will likely push more users into flouting the laws. Although I have been critical of the expansion of intellectual property laws, I do believe that when appropriately calibrated, intellectual property laws serve a valuable function in protecting authenticity and quality.<sup>21</sup> Intellectual property laws *can* and *should* adapt to the sharing culture, and user voices should be taken into account. Therefore, this Commentary seeks to answer the question of how to strengthen the voices of the users such that they begin to be heard.<sup>22</sup>

Part of the answer to this question can be found within an unexpected source:<sup>23</sup> Professor Roberta Rosenthal Kwall's fascinating new

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(AIPLA), were instrumental in lobbying Congress to change the Federal Trademark Dilution Act after the United States Supreme Court had increased the standard of proof. Marc L. Delflache et al., *Life After Moseley: The Trademark Dilution Revision Act*, 16 TEX. INTELL. PROP. L.J. 125, 144–45 (2007).

18. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 500 (2001) (“Internal cultural ferment is suppressed as law authorizes the exclusion of dissenters who threaten to dilute a culture’s distinctiveness.”).

19. See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (describing the “feedback” loop that occurs from licensing practices).

20. For example, Coca-Cola’s Facebook page was initially created by two Coke fans, but then adopted by Coca-Cola as its official page. The two fans were then hired to maintain the page. Gerhardt, *supra* note 11, at 1513.

21. See Leah Chan Grinvald, *Resolving the IP Disconnect for Small Businesses*, 95 MARQUETTE L. REV. 1491, 1508–09 (2012) [hereinafter Grinvald, *Resolving the IP Disconnect*] (discussing the differences between counterfeit enforcement and trademark infringement enforcement and acknowledging that counterfeit enforcement is warranted).

22. Many other scholars have looked at this question from different angles. See sources discussed *infra* notes 134–167.

23. Professor Kwall, who has drawn parallels and connections between Jewish law and intellectual property law in prior work. See sources cited *infra* note 98. In addition, other notable

work, *The Myth of the Cultural Jew*.<sup>24</sup> In her new book, Professor Kwall grapples with similar issues within Judaism and Jewish law, and relevant parallels exist between Jewish law and intellectual property law.<sup>25</sup> From *The Myth of the Cultural Jew*, this Commentary draws three lessons to assist in strengthening the voices and actions of social-media users. The first lesson is that the different strata of any particular community are intertwined. The power relationship between the top-down lawmakers and the bottom-up community members are inextricably interdependent.<sup>26</sup> Due to this interdependence, the community must work together within the same legal tradition. While there is a place for cultural dissent, Professor Kwall persuasively argues that turning one's back on the legal tradition will contradict the desired goal of maintaining the global Jewish tradition.<sup>27</sup> Second, based on her work, this Commentary concludes that the group that will be most powerful and likely most successful in influencing legal changes will be a middle group.<sup>28</sup> Professor Kwall shows us that within the Jewish community, a larger middle ground is needed—one that can be authentic within the tradition, but advocate for change.<sup>29</sup> Lastly, Professor Kwall's book persuades the reader that it will often be easier to change interpretative prohibitions versus explicit ones.<sup>30</sup> Interpretative prohibitions are those that are not written in the law, but rather are legal norms or customs that have developed over the course of time.<sup>31</sup> These norms or customs can have the force of law, but are more amenable to change, particularly when the voices of the community are taken into account.<sup>32</sup>

The remainder of this Commentary illuminates these lessons over the course of three parts. Part I provides an overview of Professor Kwall's book, focusing on these three lessons as they relate to this Commentary's goal of strengthening the voices of social-media

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scholars have also looked at the interplay between Jewish law and intellectual property law. See sources cited *infra* note 97.

24. ROBERTA ROSENTHAL K WALL, *THE MYTH OF THE CULTURAL JEW: CULTURE AND LAW IN JEWISH TRADITION* (2015).

25. See *infra* Part III.C.

26. See *infra* Part II.A.3.

27. See *infra* Part II.B.

28. See *infra* Part II.B.

29. K WALL, *supra* note 24, at 287.

30. See *infra* Part II.C.

31. As will be discussed further in Part II.C.3 and Part III.C, in copyright and trademark law, commercial parodies of copyrighted works or brands are implicit prohibitions. The statutory text does not prohibit such unauthorized uses of intellectual property, but yet some courts have interpreted the law to prohibit commercial parodies. See *infra* Part III.C.

32. See *infra* Part III.C.

users.<sup>33</sup> In Part II, attention is given to a discussion of social media, providing an overview of the growth of the sharing culture and the attack on that culture by some intellectual property holders. Parallels are then drawn between Professor Kwall's book and the sharing culture's relationship to intellectual property holders and the law. Part III then utilizes the lessons drawn from *The Myth of the Cultural Jew* to help craft suggestions to strengthen the voices of social-media users. Utilizing one of the central lessons drawn from Professor Kwall's book, this Commentary argues that well-educated social-media users are needed. This Commentary terms this group the middleists, who are users who are intimately knowledgeable about intellectual property laws who can successfully rebuff overenforcement efforts by intellectual property holders. In addition, this Commentary argues that this group of "middleists" must work within the law and be strategic in choosing interpretative prohibitions to seek to change first. Through this, a collective impact can be made and assist in preserving the benefits of sharing through social media.

## II. LESSONS FROM *THE MYTH OF THE CULTURAL JEW*

*The Myth of the Cultural Jew* is an elegant and well-researched book that will be fascinating to Jews and non-Jews alike. First and foremost, Professor Kwall's work adds richness to the reader's knowledge and understanding of Judaism and Jewish law (*halakhah*), even to those readers who are Jewish. Professor Kwall's central thesis is that because Jewish law and Jewish culture are "deeply intertwined,"<sup>34</sup> even Jews who believe they are simply "culturally Jewish" must embrace *halakhah* to some degree.<sup>35</sup> Related to her thesis, Professor Kwall seeks answers to the burning issue facing modern Judaism: survival. Professor Kwall finds both the proof for her thesis and answers to Jewish survival in cultural analysis.

Among Professor Kwall's many contributions to the recent and extensive literature on law and cultural analysis<sup>36</sup> is her ability to lucidly

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33. It goes without saying that there are many layers to *The Myth of the Cultural Jew*, but due to space and subject-matter limitations, they cannot all be covered. I simply urge you to read the book for yourself.

34. Kwall, *supra* note 24, at 25.

35. *See id.* at 281.

36. *See generally* JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012); PATRICIA EWICK & SUSAN S. SIBLEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999); JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE* (2012); Dan Hunter, *Culture War*, 83 *TEX. L. REV.* 1105 (2005); Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35 (2001); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?*:

explain and expound on the benefits of using cultural analysis as an analytical tool. Because this methodology is concerned with understanding cultural dissent and its interdependence with social norms, it is one of the best tools to facilitate legal and cultural change from within a particular culture.<sup>37</sup> Both Professor Kwall and this Commentary are concerned with this concept. Whereas Professor Kwall is concerned with historical and current applications of Jewish law to facilitate the survival of the Jewish tradition, this Commentary seeks ways to adapt intellectual property law to social-media users in order to retain the sharing culture that has developed.

As other cultural analysis theorists have argued, often the voices of the more powerful members within a cultural group are heard, overshadowing the voices of the cultural dissenters.<sup>38</sup> Building on this, Professor Kwall insightfully discovers that a larger, louder middle group is what is needed to navigate the extremes in order to allow both preservation of the cultural tradition with necessary change.<sup>39</sup> As she demonstrates, changes to cultural tradition can be more easily accomplished when the norms sought to be changed do not embody explicit prohibitions. The remainder of this Part further explores the three lessons taken from Professor Kwall's book, and is followed by an analysis of the parallels between Professor Kwall's work and the social-media user community's struggle with intellectual property law in Part II.

#### A. *Power Relationships and Jewish Law*

Professor Kwall writes that in Judaism, there are two main relationships, where power flows vertically and horizontally.<sup>40</sup> First, there is a vertical-power relationship between God and the Jewish people: "Jewish law is steeped in a vertical conception of Divine authority over mankind."<sup>41</sup> There is a second vertical-power relationship between the Jewish people and their rabbis: "the rabbis declared the law and the people obeyed."<sup>42</sup>

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*Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001).

37. Sunder, *supra* note 18, at 555 ("[A] cultural dissent approach would recognize—and accommodate—seismic shifts in culture. And very different results are likely to flow from this approach.")

38. *Id.* at 515.

39. See Kwall, *supra* note 24, at 288; see also *infra* Part II.B.

40. Kwall, *supra* note 24, at 14.

41. *Id.* at 15.

42. *Id.* at 14.



On the other hand, because “the development and interpretation of Jewish law is within the purview of human beings” who “are, in theory, equal to one another,” Jewish lawmaking also has a horizontal component.<sup>43</sup> Significantly, however, “much of the Jewish tradition was shaped by the people’s own practices or customs that often arose in a manner parallel to the exercise of lawmaking authority by the rabbis.”<sup>44</sup> Professor Kwall notes that “[t]his bottom-up phenomenon affords another horizontal dimension to the *mesorah* [Jewish tradition] given that customs are not the product of either Divine authority or rabbinic leadership.”<sup>45</sup> In short, the top-down lawmaking element is intertwined with the bottom-up practices of the community of Jewish people. Through their everyday practices, the community has had a feedback effect on the top-down interpretation and enforcement of *halakhah*.<sup>46</sup>

### 1. *Top-Down Lawmaking*

The process of Jewish lawmaking has traditionally been through a top-down vertical-power relationship, beginning with the transfer of the Ten Commandments from God to Moses at Mount Sinai.<sup>47</sup> In Chapter 2, Professor Kwall provides an extensive overview of the origin and development of Jewish law from the top-down view.<sup>48</sup> From this starting point, Professor Kwall is able to show a logical progression of the Jewish law from Mount Sinai to the Talmudic period and beyond.<sup>49</sup> Throughout all of these periods, Professor Kwall points to the ingenuity of the rabbis in tying new approaches to Judaism to the past, such that these “new” approaches seemed authentic. For example, in the Talmudic period, Professor Kwall uses the Passover meal as an illustration of the innovation linked to continuity: it is the “prototypical example of the rabbinic model at work.”<sup>50</sup> Similar to the modern-day American Jew, Jews living during the Talmudic period faced a sustainability issue due to the destruction of the Second Temple, along with its sacrificial culture. From a cultural analysis standpoint, the rabbinic sages during the Talmudic period provide a fascinating model

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43. *Id.*

44. *Id.*

45. *Id.*

46. This “feedback” effect is not singular to the Jewish community. See generally Gibson, *supra* note 19 (arguing that the feedback loop in intellectual property law comes from licensing practices).

47. See Kwall, *supra* note 24, at 29.

48. *Id.* at 29–54.

49. See *id.* at 32–49.

50. *Id.* at 45.

for sustainability that not only relied on past Jewish tradition but also borrowed from and reinterpreted elements from the surrounding majority cultures, such as Hellenism.<sup>51</sup> Therefore, although the surrounding cultures influenced the development of *halakhah*, it was used as the binding glue to keep the Jews within the tradition while moving them forward within their current environment.

## 2. *Bottom-Up Community*

In Chapter 3, Professor Kwall turns her attention to the community of the Jewish people, or the view from the bottom up.<sup>52</sup> In this chapter, Professor Kwall explores how some persistent practices or customs of the bottom-up community wove their way into *halakhah*. This is central to a cultural analysis of the law: “[t]he contribution of the bottom up to the development of all of the customs discussed is highly significant from a cultural analysis standpoint.”<sup>53</sup> Professor Kwall focuses on three themes where the practices of the Jewish people have had an impact: (1) where the community practices have validated biblical and rabbinic texts, laws, and authority; (2) where community practices have been relied on by rabbinic determinations (or influences) of the law; and (3) where community practices have been tolerated by rabbis, even when the law does not formally endorse the practice.<sup>54</sup> Due to concerns of space in this Commentary, only the second theme will be discussed further.<sup>55</sup>

For the second theme, the reliance on the bottom-up community practice to inform *halakhah*, Professor Kwall provides the example of the increasing stringencies of the laws surrounding food, or *kashrut*.<sup>56</sup> An important element of *kashrut* is the separation of dairy and meat products. But for all of its importance, the Torah does not contain much guidance about this complicated area.<sup>57</sup> Due to this, the development of *kashrut* illustrates the importance of a cultural analysis methodology. For example, some modern scholars have been shocked

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51. *Id.*

52. *Id.* at 55–84.

53. Kwall, *supra* note 24, at 58.

54. *Id.* at 61.

55. The first and third themes are very interesting in-and-of themselves. For example, Jewish practices that validated rabbinic authority include those surrounding childbirth amulets, such as the one that inscribed the three commandments for women. *Id.* at 67. An example of the third theme, toleration of customs lacking specific bases in *halakhah*, the eighteenth-century German practice of allowing a Torah scroll taken from local synagogues to be placed in a baby's delivery room. *Id.* at 74–75.

56. *Id.* at 81.

57. *Id.* The Torah prohibition states, “You shall not boil a kid in its mother's milk.” *Exodus* 23:19.

to learn that back in the fourteenth century, separate dishware was not required if the food served was cold.<sup>58</sup> However, the practice of separate dishes has become so ingrained in Jewish practice, that it has the force of law: “serving cold cuts on a ‘dairy’ dish [is] simply *treif* (not kosher).”<sup>59</sup> As Professor Kwall notes, “The development of the kosher kitchen customs is one of many illustrative examples of how bottom-up practices substantially impacted the development of *halakhah* from the top down.”<sup>60</sup> This “feedback” mechanism illustrates the interdependence of the top-down and bottom-up within Judaism. This interdependence results in a need to work within the legal tradition while seeking legal changes, will be discussed in the next section.

### 3. *Working Within the Legal Tradition*

Having established the interdependence between the top-down and bottom-up practices within Judaism, Professor Kwall next illustrates the need for members of the community to work within the legal tradition while seeking changes to that tradition. Without the terminology of the law, groups that attempt to work outside of the legal tradition are not viewed as authentic, and the “cultural and religious community disintegrates.”<sup>61</sup> Because the main thrust of cultural dissenters (those who desire change) is to stay within the community,<sup>62</sup> working outside of the legal tradition is counterproductive if it brings about disintegration.

To illustrate this, Professor Kwall first provides a historical perspective of the three major denominations of Judaism in Chapter 4, which lays another necessary foundation for the remainder of the book. As Professor Kwall demonstrates through her discussion, each of the denominations views the relevance of *halakhah* differently: (1) “Jewish law informs Jewish life but is not binding upon the Jews”; (2) “Jewish law is binding, but its interpretation should mesh with modernity in a way that preserves its authenticity yet allows for its evolution”; and (3) “Jewish law is binding, and modernity is not a significant factor in its interpretation (although current realities can influence its applica-

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58. Kwall, *supra* note 24, at 81 (quoting Haym Soloveitchik on this evolution of this *kashrut* practice).

59. *Id.*

60. *Id.* at 83.

61. *Id.* at 162.

62. Sunder, *supra* note 18, at 516. However, there are those who leave the community to create offshoots of the original community, such as Humanistic Judaism. See Kwall, *supra* note 24, at 93.

tion.)”<sup>63</sup> These three perspectives roughly correspond to how Jewish law is viewed in the Reform, Conservative, and Orthodox movements respectively, although, of course, there are variations. An interesting observation by Professor Kwall is that the more a community moves to the left (away from the binding nature of *halakhah*), the more it is seen as inauthentic by more traditional communities.<sup>64</sup> For example, one movement that was founded in 1963, Humanistic Judaism, is viewed as completely beyond the pale even by Reform Judaism. This is because Humanistic Judaism eliminates not only the need for adherence to *halakhah*, but also the need for belief in God.<sup>65</sup>

With this background in place, Professor Kwall examines some of the major issues facing Judaism in the modern age in Chapters 5 (“Foundational Conflicts”),<sup>66</sup> 6 (“Homosexuality”),<sup>67</sup> and 7 (“Women and Synagogue Ritual”)<sup>68</sup> through the framework of cultural analysis. This framework is extremely useful to understand why working within the legal tradition is critical to maintaining authenticity within the community. For example, one of the most foundational issues of Judaism is the question, “Who is a Jew?” In answering this question, Reform Judaism has departed from the traditional matrilineal principle of *halakhah*. Instead of requiring one’s mother to be Jewish, Reform Judaism has declared that if either parent is Jewish, their children are presumed Jewish “as long as they publicly manifest a positive and exclusive Jewish identity.”<sup>69</sup> Conservative and Orthodox Judaism have both taken issue with this determination, as prior to 1983, “all denominations were in agreement on the boundaries of membership.”<sup>70</sup> Although Reform Judaism adopted the “Patrilineal Resolution” as a response to the rise of intermarriage, this change outside of the legal tradition poses problems for Reform Jews wishing to marry Conservative or Orthodox Jews, as well as for non-Reform rabbis who

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63. *Id.* at 131.

64. *See id.* at 93.

[T]he Orthodox see the Reform and Conservative movements as outside the boundaries of the tradition; and Conservative Judaism, at least on a theoretical level, views Reform Judaism’s unwillingness to embrace the binding nature of *halakhah* as outside of the tradition’s framework. Reform, in turn, has ruled that Humanistic Judaism is outside the pale.

*Id.*

65. *Id.*

66. *Id.* at 129–56.

67. *Id.* at 157–92.

68. Kwall, *supra* note 24, at 193–224.

69. *Id.* at 135.

70. *Id.* at 139.

will not perform a wedding ceremony without an official conversion to Judaism.<sup>71</sup>

This unilateral change, seen as taking Reform Judaism completely outside of the law, does not sit well even for some members of Reform Judaism.<sup>72</sup> This disagreement among Reform Jews highlights another important point emphasized by Professor Kwall, which is that while the denominational labels appear to neatly categorize American Jews, they hide the reality of the fluidity of thought and practice. In fact, Professor Kwall points out that “there are indications that a postdenominational milieu is the wave of the future, with the divisions grouped along the lines of ‘traditional versus progressive’ rather than specific denominational affiliations.”<sup>73</sup> This postdenominationalism is part of the importance of the emerging middle ground.

### B. Growth of the Middle

One of the themes running throughout *The Myth of the Cultural Jew* is that a stronger and more vocal middle is needed across denominations in order to navigate the environmental pressures on Judaism with the least amount of damage to its authenticity. This is summed up in Chapter 10 of the book, “The Lessons of Cultural Analysis”:<sup>74</sup> “The overall fluidity of a cultural analysis perspective with respect to the *mesorah* [Jewish tradition] underscores the importance of a strong middle ground in the Jewish community.”<sup>75</sup> This strong middle encompasses members from all denominations, and Professor Kwall points out the rising synergies among some members across denominations. For example, Rabbi Asher Lopatin, President of Yeshivat Chovevei Torah, has stated his dream of cutting across denominations: “My dream is to have Hebrew Union College, the Jewish Theological Seminary, Hadar, and Chovevei on one campus, to move in together. We’d each Daven [pray] in our own ways, but it could transform the Upper West Side.”<sup>76</sup>

In order to strengthen this middle, Professor Kwall suggests, “Effective Jewish education geared to non-Orthodox Jews is one of the most vital ways of fostering a stronger middle ground within the global Jew-

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71. See *id.* at 140.

72. See *id.* at 139.

73. *Id.* at 125.

74. Kwall, *supra* note 24, at 281–97.

75. *Id.* at 288.

76. *Id.* at 290 (quoting Rich Dweck, *The New “Morethodox” Rabbi Asher Lopatin Succeeds Avi Weiss at an Influential Seminary, Offering a Pluralistic Version of Orthodoxy*, JEWISH PINK ELEPHANT (May 1, 2013), <http://www.jewishpinkerlephant.com/2013/05/the-new-morethodox-rabbi-asher-lopatin.html>).

ish community.”<sup>77</sup> This is one way to have community members understand its own Jewish history in order to interpret the tradition in new but authentic ways. In particular, Professor Kwall suggests that *aggadah*, which is “not only biblical and rabbinic narrative but also wisdom, speculation, and folklore, can be especially useful in educating Jews about the beauty and particularity of the tradition.”<sup>78</sup> Professor Kwall provides a few examples of how narrative can play an important role in Jewish education because it is accessible and can interest non-Orthodox Jews with moral lessons.<sup>79</sup> One example she gives is the speech of a newly elected Israeli parliament member, Dr. Ruth Calderon. In her speech to the parliament, Dr. Calderon uses the story of a rabbi who was so focused on his religious studies that he neglected to come home for his annual visit to his wife (and the rabbi eventually died due to this). Calderon explained the story as teaching us “that one who adheres to the Torah at the expense of being sensitive to human beings is not righteous.”<sup>80</sup>

The growth of this middle is important. As Professor Kwall states, “The right end of the religious spectrum keeps the boundaries in check and sets the tone; the left end pushes the boundaries and brings new visions and energy. The middle provides a critical center that balances the energies on both sides while operating as a check against extremist tendencies.”<sup>81</sup> It may be that this middle group will be able to navigate needed changes to the legal tradition that can move Judaism forward, while enabling it to retain its particularity and authenticity. How this middle group can do this within the legal tradition is discussed next.

### C. *Explicit Versus Interpretative Positions*

One last lesson this Commentary draws from Professor Kwall’s highly relevant book is her underscoring of the important strategic point that when cultural dissenters want change to be made, it is often easier to influence change where there is gray area in the law. Within Judaism, this means that it will be harder (and more radical) to change a tradition that has a root in biblical law.<sup>82</sup> Less radical, although still difficult to change, is a tradition that involves a reinterpretation or even a complete abandonment of a rabbinic law, or one that draws

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77. *Id.* at 291.

78. *Id.*

79. *Id.* at 293.

80. Kwall, *supra* note 24, at 292.

81. *Id.* at 287.

82. *Id.* at 132.

from both biblical and rabbinic law.<sup>83</sup> This Commentary refers to positions from biblical law as “explicit,” and to positions from rabbinic law (or those at the intersection of biblical and rabbinic law) as “interpretative.”<sup>84</sup>

In Chapters 6 and 7, Professor Kwall addresses two examples of conflict based on explicit and interpretative positions: homosexuality<sup>85</sup> and female participation in synagogue ritual.<sup>86</sup> For the former issue, homosexuality is explicitly prohibited pursuant to Jewish law found in the Torah. In contrast, the prohibition of women publicly reading from the Torah is more interpretative, and is based more on cultural responses than explicit law. Therefore, it is arguable that the embrace of more female participation in ritual, as desired by cultural dissenters, is easier to achieve within *halakhic* boundaries.<sup>87</sup> Each will be discussed in turn.

### 1. *Explicit Positions*

Chapters 18 and 20 of *Leviticus* both contain explicit prohibitions on homosexuality and a punishment: “If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death—their bloodguilt is upon them.”<sup>88</sup> With this as the starting point in Chapter 6, Professor Kwall notes that even the most liberal denomination, Reform Judaism, viewed homosexuality as prohibited even as late as 1973.<sup>89</sup> In recent years, however, it has become impossible not to revisit the issue, given the advancements in secular society to explicitly acknowledge the rights of gay men and women to marry and maintain family lives equal in dignity to heterosexual families.<sup>90</sup> Through her cultural analysis framework, Professor Kwall is able to demonstrate the difficulties that each of the denomi-

83. *Id.*

84. *See id.* at 64.

[I]t is also the case that when custom is in opposition to the *unanimous* opinion of the legal authorities, it will not prevail. In the words of a fifteenth-century *halakhist*, “For if we were to abolish laws prohibiting certain things as a result of the (contrary) *minhag* [custom], then one by one all prohibitions will be permitted and the whole of the Torah set at naught.”

*Id.*

85. *Id.* at 157–92.

86. Kwall, *supra* note 24, at 193–224.

87. *Id.* at 192 (“This type of situation presents an ideal opportunity for applying cultural analysis to support a change in willing traditional communities.”).

88. *Id.* at 157 (quoting *Leviticus* 20:13).

89. *Id.* at 158.

90. *See generally* George Chauncey, Op-Ed, *The Long Road to Marriage Equality*, N.Y. TIMES, June 26, 2013, at A31, available at [http://www.nytimes.com/2013/06/27/opinion/the-long-road-to-marriage-equality.html?\\_r=0](http://www.nytimes.com/2013/06/27/opinion/the-long-road-to-marriage-equality.html?_r=0). Of course, the struggle is not completely over. *See gener-*

nations has had in addressing this issue.<sup>91</sup> Due to the explicit nature of the prohibition under biblical law, for many traditional thinkers, there is no movement in *halakhah* to accept same-sex marriage.<sup>92</sup> However, despite this there are members across all denominations who attempt to work within the traditional boundaries of the law to create more welcoming synagogue environments for homosexuals and their families. This means that a variety of responses to the issue may ensue, as a cultural analysis methodology does not dictate any particular result. But the different responses across the denominations reveal not only the value of pluralism, but also the inherent difficulty in altering an explicit legal prohibition.

## 2. *Interpretative Positions*

By contrast, an interpretative position, one based on rabbinic law or where it is unclear whether it is biblical or rabbinic, may be more amenable to change. One example is the participation of women in synagogue rituals. In Orthodox Judaism, women are prohibited from participating in synagogue rituals, such as publicly reading from the Torah or saying the accompanying blessings (known as *aliyyot*).<sup>93</sup> Professor Kwall traces this prohibition to one embedded in cultural practices. Unlike homosexuality, it is not a prohibition based on explicit language in the Torah or Talmud. The Talmudic text to which the prohibition is traced is itself not very clear, as it first states that women may be called to the Torah on the Sabbath, but then states that women should not read publicly from the Torah “because of the dignity of the congregation.”<sup>94</sup> After a thorough discussion of other historical texts and rabbinic opinions, Professor Kwall concludes that “the classical Jewish sources concerning the issues of women reading from the Torah and receiving *aliyyot* contain contradictory strands and are capable of supporting different conclusions.”<sup>95</sup> Professor Kwall argues that this ambiguity leaves the law more open to cultural influences: “Thus, the introduction of greater female participation in synagogue ritual can be understood as a natural development in *halakhah*

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ally SEAN CAHILL & SARAH TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES (2007).

91. Kwall, *supra* note 24, at 159–63 (discussing Reform Judaism’s response); *id.* at 163–69 (discussing the Orthodox response); *id.* at 169–86 (discussing Conservative Judaism’s response).

92. *See id.* at 164, 167. Even for some Orthodox rabbis who would welcome a bit more openness in allowing active homosexuals into the Jewish community, same sex marriage is still taboo. *Id.* at 167 n.49 (quoting Rabbi Shafner).

93. *Id.* at 194.

94. *Id.* at 197 (internal quotation marks omitted).

95. *Id.* at 207.



based on current understandings of the role and character of women in today's cultural milieu rather than as a 'major reform' necessitating a substantial departure from the tradition."<sup>96</sup>

In sum, Professor Kwall's discussion of these two charged issues shows us that cultural analysis values plurality and preservation of tradition. Due to this, there will always be some explicit positions that the voices of the community may not be able to influence. However, if the position is interpretative, community voices may be able to more easily influence changes in the law to reflect current cultural responses. This important lesson, along with the other two discussed above, will be applied in Part III. Before addressing the applicability of these lessons to the social-media user community, some ground-work will be laid with respect to the issues facing this community, and the parallels to the struggles within the Jewish community.

### III. SOCIAL MEDIA, SHARING, AND DRAWING PARALLELS

Although intellectual property law is not "divine" in nature (despite what some intellectual property holders would have you believe!), there are parallels between issues within Judaism and within intellectual property law.<sup>97</sup> In fact, Professor Kwall herself has previously written about the parallels between the two fields.<sup>98</sup> This section seeks to draw those parallels in order to make clear that *The Myth of the Cultural Jew* has wide-ranging implications for understanding legal reform. First, an important foundation will be laid for this Commentary's use of the term "social media" and the rise of the sharing culture. This Commentary then discusses how this sharing culture has come under attack by those seeking to maintain the traditional exclusivity of intellectual property law.

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96. *Id.* at 194–95.

97. Other notable scholars also find direct applications. See generally Neil W. Netanel & David Nimmer, *Is Copyright Property?—The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES IN L. 241 (2011); David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219 (1998).

98. See generally Roberta Rosenthal Kwall, *Intellectual Property Law and Jewish Law: A Comparative Perspective on Absolutism*, 22 YALE J.L. & HUMAN. 143 (2010) (reviewing DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* (2009)); Roberta Rosenthal Kwall, *Is the Jewish Tradition Intellectual Property?*, 4 WIPO J. 129 (2012); Roberta Rosenthal Kwall, *The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights*, 14 VAND. J. ENT. & TECH. L. 889 (2012); Roberta Rosenthal Kwall, *Remember the Sabbath Day and Enhance Your Creativity!*, 10 U. ST. THOMAS L.J. 820 (2013).

A. *Social Media and the Rise of the “Sharing Culture”*

The term “social media” is popularly used to refer to an online platform that allows its users to share information and content among a social network.<sup>99</sup> Other scholars writing in this area typically use the term broadly so that it incorporates all types of various interfaces that allow for communities to develop and share things of interest to them, including information (personal and public, such as status updates), affiliations, and creative endeavors (both of their own making and other’s).<sup>100</sup> This Commentary also uses the term “social media” quite broadly to encompass all online platforms, whether it be a website, an application for a smartphone, or otherwise, that are used for sharing.<sup>101</sup> One of the more remarkable aspects of social media discussed in this part<sup>102</sup> is the breadth of the sharing culture, from the extent to which information is shared, to the different types of information shared.

Sharing information is nothing new; in fact, one could argue that the whole infrastructure of the Internet was premised on the principle of sharing information.<sup>103</sup> Even in the early days of dial-up connections, users could post information to be shared with other savvy users. What is new about social media sharing is the extent to which such information is shared, which has magnified beyond what the first creators and users could have ever imagined. For example, in 1990, when Tim Berners-Lee created the first webpage so he and his fellow scientists could share information regarding their work at CERN (European Council for Nuclear Research), getting others to utilize the web was a “tough sell.”<sup>104</sup> “When you showed people they’d say: ‘Oh yeah, big deal.’ They didn’t realize if everything was on the Web how cool it would be.”<sup>105</sup> However, social media’s “network” model has

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99. *Social Media*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/socialmedia> (last visited Feb. 11, 2015) (defining “social media” as “forms of electronic communication (as Websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)”).

100. DANAH BOYD, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 6 (2014); see also Gerhardt, *supra* note 11, at 1495; Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 *BUFF. L. REV.* 851, 860 (2010).

101. Almost all of the social media sites or applications have this in common. See David H. Goff, *A History of Social Media Industries*, in *THE SOCIAL MEDIA INDUSTRIES* 16, 29 (Alan B. Albarran ed., 2013).

102. Of course, there are just too many to discuss in this Commentary. For more in-depth coverage, see generally BOYD, *supra* note 100; *THE SOCIAL MEDIA INDUSTRIES*, *supra* note 101.

103. BOYD, *supra* note 100, at 5.

104. Geoff Brumfiel, *The First Web Page, Amazingly, Is Lost*, NPR (May 22, 2013, 4:47 PM), <http://www.npr.org/2013/05/22/185788651/the-first-web-page-amazingly-is-lost>.

105. *Id.* (quoting Mr. Berners-Lee).

changed this dynamic, in which one user shares her information with those in her “network.”<sup>106</sup> This network is made up of friends, as well as friends of friends, or others with similar interests.<sup>107</sup> Information that is shared within a network may be more far-reaching than simply posting a Web page with the same information, particularly if that information “goes viral.”<sup>108</sup>

In addition, with social media, the type of information shared has changed dramatically. Instead of posting code or other scientific information, as the first Web pages did,<sup>109</sup> users are now sharing personal information, as well as personal creative endeavors such as photographs and videos. A tongue-in-cheek explanation (one of the many varieties floating around the web) uses a hotdog as an illustration:

Twitter: I am eating a #hotdog; Facebook: I like hotdogs; Four-square: Here is where I eat hotdogs; Hipstamatic: Here is a vintage pic of my hotdog; YouTube: Here, I am eating a hotdog!; LinkedIn: My skills include eating hotdogs; Spotify: Listening to Hotdog; Google+: I work at Google and eat hotdogs.<sup>110</sup>

Although this illustration is amusing and harmless, if the illustration used a trademark, such as “Chanel” or “LV,” the holders of those trademarks would perhaps not view the use as either amusing or harmless, particularly if the use was critical in nature.<sup>111</sup> And this is what social-media users are also doing, in addition to sharing their personal information: they are taking others’ intellectual property and either sharing it as is or “remixing”<sup>112</sup> it.

Further, it is not only users that are sharing in intellectual property rights, but also the intellectual property holders themselves.<sup>113</sup> Numerous examples abound, including the #AlexFromTarget meme, in which a customer at a Target store snapped a few pictures of a hand-

106. See Gerhardt, *supra* note 11, at 1495.

107. danah boyd, *Why Youth ♥ Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in *YOUTH, IDENTITY, AND DIGITAL MEDIA* 119, 123–24 (David Buckingham ed., 2008).

108. BERGER, *supra* note 1, at 4–10.

109. Brumfiel, *supra* note 104.

110. Scott Goodson, *Social Media Explained*, FORBES (Feb. 6, 2012, 4:53 PM) <http://www.forbes.com/sites/marketshare/2012/02/06/social-media-explained/>.

111. See Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 404, 404–05 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

112. See generally LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

113. As Professor Deborah Gerhardt has notably pointed out, when a company such as Tupperware utilizes Facebook to advertise to its customer base, it is sharing in the use of the trademark “Facebook.” Gerhardt, *supra* note 11, at 1515.

some teenager working at the checkout. The photos were tweeted with the hashtag, “#AlexFromTarget” and it went viral: within twenty-four hours of the initial tweet, the photo was retweeted over 821,000 times.<sup>114</sup> The Monday after the initial tweet, Target itself tweeted, “We heart Alex too. #AlexFromTarget.”<sup>115</sup> In this tweet, Target shared in the intellectual property of one of its customers (the original photos) and its own employee (for example, the right of publicity for Alex, because Alex became a sensation and has appeared on Ellen DeGeneres’ talk show).<sup>116</sup> In addition, Target acquiesced to the customer’s use of its trademark in the original tweet (and any rights they may arguably have in the trade dress of employee uniforms or store layouts, as could be seen from the photos).<sup>117</sup>

### B. *The Sharing Culture of Social Media Is Under Attack*

Although unauthorized use or sharing of intellectual property, particularly trademarks and copyrights, is not a new phenomenon, the nature and the breadth of overlapping networks has expanded its initial reach. Popular items can go viral in a matter of seconds with shares, likes, and retweets.<sup>118</sup> In this way, not only are more purported infringements discovered, but the corresponding alleged harm is thereby magnified in the eyes of intellectual property holders.<sup>119</sup> Intellectual property holders have not taken these developments lying down; to the contrary, they have intensified their enforcement efforts, both with litigation and threatened litigation.<sup>120</sup> All of this enforcement and, as I have argued elsewhere, overenforcement,<sup>121</sup> has begun to take its toll on sharing, and has even spawned additional litigation: in one instance, a twenty-nine second video was taken down from YouTube by Universal Musical Publishing Group (UMPG) because a

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114. Jessica Durando, “*Alex From Target*” Rises to Internet Fame, USA TODAY (Nov. 3, 2014, 12:55 PM), <http://www.usatoday.com/story/news/nation-now/2014/11/03/alex-target-twitter-instagram-trending/18408467/>.

115. TWITTER, *supra* note 12.

116. Alison Griswold, *Watch Alex from Target Appear on the Ellen Show*, SLATE (Nov. 5, 2014, 11:46 AM), [http://www.slate.com/blogs/moneybox/2014/11/05/alex\\_from\\_target\\_watch\\_the\\_teen\\_idol\\_and\\_viral\\_twitter\\_meme\\_appear\\_on\\_ellen.html](http://www.slate.com/blogs/moneybox/2014/11/05/alex_from_target_watch_the_teen_idol_and_viral_twitter_meme_appear_on_ellen.html).

117. *See* Durando, *supra* note 114 (showing the original image that was tweeted).

118. *See* BERGER, *supra* note 1, at 7–8.

119. *See* Goldman, *supra* note 111, at 411–13.

120. Grinvald, *Policing*, *supra* note 15, at 8–9 (documenting the trend of threatened litigation through abusive cease-and-desist letters).

121. *See generally* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625 [hereinafter Grinvald, *Shaming*] (arguing that trademark bullies are overenforcing their legal rights).

baby was dancing to a Prince song in the background.<sup>122</sup> The mother of the cute dancing baby brought a lawsuit against UMPG with the help of the Electronic Frontier Foundation, a nonprofit organization dedicated to preserving user rights on the internet.<sup>123</sup> The litigation has been ongoing since 2007 and is currently at the appellate level.<sup>124</sup>

Unfortunately, for the most part, the courts<sup>125</sup> and Congress<sup>126</sup> have come down on the side of intellectual property holders. This can be explained by numerous factors, two of which are the exclusivity theory that underlies much of intellectual property law, and the value placed on intellectual property rights in recent times. With respect to patents and copyright, the right to exclude others from making any form of use of one's patent or copyright for the prescribed term is constitutionally granted.<sup>127</sup> For trademarks, the right to exclude was not traditionally set in stone, and only over time have trademark rights become practically equivalent to copyrights or patents.<sup>128</sup> Hand in hand with the principle of exclusivity gaining greater force over the last century has been the increase in the value placed on intellectual property. Some business entities are valuable simply because of their intellectual property: for example, in 2011, more than half of Apple's valua-

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122. *Lenz v. Universal*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/cases/lenz-v-universal> (last visited Mar. 21, 2015).

123. Corynne McSherry, *Lenz v. Universal: This Baby May Be Dancing to Trial*, ELECTRONIC FRONTIER FOUND. (Jan. 28, 2013), <https://www EFF.org/deeplinks/2013/01/lenz-v-universal-baby-may-be-dancing-trial-0>.

124. *See id.*; Appellee & Cross-Appellant's Reply Brief on Cross-Appeal, *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir. filed Mar. 20, 2014), available at <https://www EFF.org/document/lenz-reply-0>.

125. However, as Professor William McGeeveran and other notable professors have pointed out, when the alleged infringement is an act of free speech, courts typically come out on the side of free speech, and thus get the case right. William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 51 (2008). The problem, as Professor McGeeveran has noted, is that it is rare for these cases to come in front of the courts due to a variety of factors, including the lack of resources by the speaker (or user), resulting in self-censorship after the intellectual property holder simply threatens litigation. *Id.* at 51-52.

126. For example, Congress enacted the Copyright Extension Act, which extends the term of exclusive copyright rights from fifty to seventy years, at the behest of large copyright owners, such as The Walt Disney Co. Jack Kapica, *Copyright and the Mouse: How Disney's Mickey Mouse Changed the World*, DIGITAL J. (Oct. 6, 2004), <http://www.digitaljournal.com/article/35485>.

127. U.S. CONST. art. 1, § 8, cl. 8.

128. Many scholars have written extensively about the "propertization" of trademarks. *See generally* Lionel Bently, *From Communication to Thing: Historical Aspects to the Conceptualisation of Trade Marks as Property*, in TRADEMARK LAW AND THEORY, *supra* note 111, at 3; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999). Additionally, an important distinction between trademarks and copyright or patents is that a trademark can theoretically be maintained indefinitely, so long as the holder maintains its use.

tion came from its trademark portfolio.<sup>129</sup> In addition, the rise of the patent troll business model gives credence to the argument that intellectual property has value that is divorced from any underlying product or service.<sup>130</sup>

The notion of exclusive and valuable rights over one's creation, invention, or brand does not square comfortably with any notion of sharing those rights. The problem with this is that with the technological advances seen over the last half century, the use and sharing of others' intellectual property has become part of our everyday lives.<sup>131</sup> Professor Madhavi Sunder has eloquently argued that we are all "participants" in the creative process, and that the new generation of users "views intellectual properties as the raw materials for its own creative acts, blurring the lines that have long separated producers from consumers."<sup>132</sup> To illustrate the extent to which others' intellectual property has become part of our everyday existence, Professor John Tehranian examined how the typical actions of just one day in the life of a hypothetical person could amount to \$12.45 million in copyright infringement.<sup>133</sup> Therefore, these professors and others have argued that the once-sacrosanct exclusivity notions of intellectual property must give way to new theories of intellectual property, new norms, and even to new laws.<sup>134</sup>

With all of this in favor of reforming our outlook on the exclusive nature of intellectual property, how can we strengthen the voices of social-media users and change intellectual property law to accommo-

129. Leah Chan Grinvald, *Trademark Law and Theory: A Handbook of Contemporary Research*, 2 IP L. BOOK REV. 23 (2011) (book review).

130. See generally Colleen V. Chien, *Reforming Software Patents*, 50 HOUS. L. REV. 325 (2012); Maayan Perel, *From Non-Practicing Entities (NPEs) to Non-Practiced Patents (NPPs): A Proposal for a Patent Working Requirement*, 82 U. CIN. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2496281](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496281); James Bessen et al., *The Private and Social Costs of Patent Trolls* (Boston Univ. Sch. of Law, Working Paper No. 11-45, 2011), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/Bessen-Ford-Meurer-no-11-45rev.pdf>.

131. See Clive Coleman, *Parody Copyright Laws Set To Come into Effect*, BBC (Oct. 20, 2014, 10:54 AM), <http://www.bbc.com/news/entertainment-arts-29408121> (reporting various artists' views on creating on social media).

132. Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 263 (2006).

133. JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 2-4* (2011).

134. See generally EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP* 23-29 (2010) (arguing that intellectual property "outlaws" play an important function in the development of our laws); TEHRANIAN, *supra* note 133 (arguing for new norms); James Grimmelman, *The Internet Is a Semicommons*, 78 FORDHAM L. REV. 2799 (2010) (arguing for a theory of semicommons for the Internet to preserve public uses of intellectual property); McGeveran, *supra* note 125 (advocating for the adoption of a new and explicit fair use exception to trademark law); Sunder, *supra* note 18 (arguing for a "cultural dissent" theory of the law).

date this sharing? I am not the first scholar to ask this question or to propose solutions to strengthen user voices.<sup>135</sup> But this Commentary is likely the first scholarly approach arguing that we can look for answers based on Professor Kwall's work concerning the Jewish tradition. The next Part draws parallels between Professor Kwall's analysis of this tradition and how we can view intellectual property law and the social-media community. Part III applies the lessons from *The Myth of the Cultural Jew* to suggest a few solutions that may assist us in strengthening user voices.

### C. Drawing Parallels

#### 1. Power Relationships and the Technological Environment

While in Judaism, the first power relationship begins with God as the divine source of Jewish law, the root source of intellectual property protection in the United States is the Constitution.<sup>136</sup> The intellectual property statutes that have been enacted by Congress are based on this constitutionally granted power.<sup>137</sup> And in turn, instead of rabbis, we have courts and judges who interpret the Constitution and congressional mandates.<sup>138</sup>

Similar to the Jewish community, the bottom-up social-media community is interdependent with the top-down community. For example, whereas the more stringent kosher practices of the bottom-up community has fed back into Jewish law, the licensing practices of the wider online community has fed back into copyright law.<sup>139</sup> In addition, this interdependence also results from the unique position of intellectual property holders. Although intellectual property holders are part of the bottom-up community because they create (and use) the original works that the community uses and shares, they have positioned themselves as part of the top-down community through their enforcement of their intellectual property rights.<sup>140</sup> Due to this, those who wish to change the law see a need to obtain some buy-in from intellectual property rights holders and continue to work within the law.<sup>141</sup>

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135. See sources cited *infra* note 167.

136. U.S. CONST. art. 1, § 8, cl. 8.

137. Patent Act, 35 U.S.C. §§ 100–105 (2012); Copyright Act, 17 U.S.C. §§ 101–1332 (2012); Lanham Act, 15 U.S.C. §§ 1051–1141 (2012) (federal trademark law).

138. U.S. CONST. art. III.

139. Gibson, *supra* note 19, at 884–85.

140. And, as I have argued elsewhere, at times intellectual property holders have been over-enforcers of the law. See generally Grinvald, *Shaming*, *supra* note 121.

141. Buy-in from law enforcement is also critical, as, governmental agency regulations could be altered to adopt different standards that would be more “friendly” to users. For example, I

## 2. *The “Middle” Users and the Legal Tradition*

Like the Jewish community, the community of social-media users can be divided along a spectrum of observance with respect to intellectual property laws. On the left side of the spectrum are those who believe that all or almost all intellectual property should be considered public “commons,” at least with respect to certain uses of intellectual property.<sup>142</sup> This can equate to, at times, “scofflaw” actions that disregard the laws, such as Torrent users or sites like Pirate Bay.<sup>143</sup> On the right side are some intellectual property holders who, at least with respect to their intellectual property, believe that the intellectual property laws are sacrosanct and should be interpreted accordingly. In the middle are those users who may seek compliance or who unintentionally violate the law, but are typically still targets of overenforcement by intellectual property holders due to broad interpretations of the law.<sup>144</sup> Similar to the Jewish community, however, there is fluidity in these categories and not all members stay within these categorical divisions at all times. For example, not all intellectual property holders take a rigid approach to the exclusivity of their intellectual property, which was seen with Tesla’s recent announcement that it would not pursue patent enforcement against inventors who use its patents in good faith.<sup>145</sup>

Users on the left end of the spectrum of intellectual property law have had an effect on intellectual property holders that is similar to that of the more progressive members of Judaism.<sup>146</sup> By working outside of the legal tradition, both the Reform movement, through its change in the definition of “who is a Jew,” and the intellectual property scofflaws have changed the existing legal tradition. This changed tradition causes a disconnect within these community groups. In fact, the effect that the two “leftist” groups have had is likely more negative for the entire community: it appears to cause the “rightists” to dig

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argued in another piece that the Customs and Border Patrol (CBP) agency currently has the ability to interpret federal law that requires the CBP to detain intellectual property-infringing products from entering the United States. See Grinvald, *Resolving the IP Disconnect*, *supra* note 21, at 1522–23.

142. Professors Peñalver and Katyal document some of these uses in their insightful book *Property Outlaws*. PEÑALVER & KATYAL, *supra* note 134, at 55–124.

143. Timothy J. Seppala, *The Pirate Bay Shutdown: The Whole Story (So Far)*, ENGADGET (Dec. 16, 2014, 2:18 PM), <http://www.engadget.com/2014/12/16/pirate-bay-shutdown-explainer/>

144. See, e.g., McSherry, *supra* note 123.

145. Cyrus Farivar, *Tesla Will Use Patents To Subvert Patent System*, ARS TECHNICA (June 12, 2014, 2:30 PM), <http://arstechnica.com/tech-policy/2014/06/tesla-will-use-patents-to-subvert-patent-systemtesla-frees-patents-wont-initiate-patent-lawsuits-against-anyone/>.

146. Of course, this Commentary is not equating the Reform movement to the activity of intellectual property infringers.



in their heels and cling to restrictive interpretations of the law. Professor Kwall illustrates this negative effect with Reform Judaism's change in the definition of "who is a Jew" by discussing how the Conservative and Orthodox denominations have still not accepted the Reform movement's change, and as mentioned previously, this disconnect continues to cause problems for marriage between Reform Jews and those who are more traditional. In the social-media community, this can be illustrated by the increasingly popular use of takedown notices, where in reaction to the proliferation of unauthorized sharing, some intellectual property holders have intensified their efforts to delete the material.<sup>147</sup>

It is the middle group who can exert more influence on both the leftists and the rightists. One of the reasons for this is that this middle group attempts to work within the boundaries of the law. Professor Kwall persuasively argues that a middle group that is committed to Jewish law is more inclined to see that Jewish law has never been stagnant and has always been subject to multiple interpretations.<sup>148</sup> So, too, can the middle group of users within the social-media community work within the legal tradition of intellectual property laws to their advantage. For example, when the small start-up company, Bear Blades, received a cease-and-desist letter from Bear Grylls Ventures for using a mark the company believed was too close to its own, it pushed back on Twitter instead of capitulating.<sup>149</sup> Bear Blades believed that its mark was not likely to cause confusion with Bear Grylls Ventures, the trademark of the celebrity adventurer, and rallied its followers to share their views on the topic to prove that others thought the same. Bear Grylls himself subsequently agreed that Bear Blades was not a threat, tweeting at them, "@BearBladesUK you guys are good to go! Apologies again. Good luck and let us know if we

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147. There are a number of scholars looking into this very issue. See THE TAKEDOWN PROJECT, <http://takedownproject.org/projects> (last visited Feb. 11, 2015). In particular, research led by leading international scholar Professor Niva Elkin-Koren is mapping the tightening of this legal regime. For an abstract of the research, see *The New Enforcement Regime: Copyright Enforcement in Cyberspace and the Rights of the Individual*, U. HAIFA, <http://weblaw.haifa.ac.il/en/research/researchcenters/techlaw/researchprojects/pages/copyrightenforcement.aspx> (last visited Feb. 11, 2015).

148. See *supra* Part II.B.

149. Alex Aldridge, *That Awkward Moment When Your Celebrity Client Tweets His Horror at the Copyright Infringement Letter You Sent on His Behalf*, LEGAL CHEEK (Aug. 11, 2014, 11:43 AM), <http://www.legalcheek.com/2014/08/that-awkward-moment-when-your-celebrity-client-tweets-his-horror-at-the-copyright-infringement-letter-you-sent-on-his-behalf/>. This is also a good example of "shaming" a trademark bully, which I discussed in a prior article. See generally Grinvald, *Shaming*, *supra* note 121.

can ever help you in your endeavours. BG.”<sup>150</sup> The question then becomes how we grow this middle group and strengthen their voices?

### 3. *Intellectual Property Law’s Explicit and Interpretative Positions*

Lastly, there are parallels between the explicit and implicit prohibitions within Jewish law and within intellectual property law. The tacit lesson from Professor Kwall’s analysis of this point, as discussed above in Part I, is that it may be more strategic for those seeking legal changes to work first on the interpretative positions, rather than on the explicit ones. In intellectual property law, one example of a parallel distinction is counterfeiting as an explicit prohibition in trademark law,<sup>151</sup> whereas commercial parodies are more of an interpretative prohibition.<sup>152</sup>

With respect to counterfeiting, United States federal trademark law explicitly prohibits counterfeit products, which are unauthorized “fakes” of original products. Counterfeiters attempt to pass counterfeits off as the original product, which is a severe crime, punishable by up to ten years in prison (among other remedies available to the government or trademark holder pursuing a lawsuit).<sup>153</sup> Although overt attempts at changing the law have been few, some arguments have been made against viewing all counterfeits as bad, based on the type of counterfeit at issue.<sup>154</sup> However, these attempts have not been met with any success, at least in the United States, where international agreements such as the Anti-Counterfeiting Trade Agreement (ACTA) have been signed to expand the reach of enforcement efforts.<sup>155</sup>

150. Aldridge, *supra* note 149. Of course, not all struggles are quite as easily resolved. I discussed in a previous article the conflict between a small beer brewery in Vermont and a large beverage corporation and the resulting struggle to obtain a nonjudicial settlement. Grinvald, *Shaming*, *supra* note 121, at 627.

151. 15 U.S.C. § 1114(1)(a) (2012) (prohibiting the “use in commerce any reproduction, *counterfeit*, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive” (emphasis added)).

152. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:72 (4th ed. 2015) (noting that a court’s holding in a trademark case could be explained by an implicit prohibition on commercial parody); see also Caroline Hewitt Fischer, *GoldieBlox and the Three Beastie Boys: The Emerging Trend of Fair Use Appropriation of Protected Material as a Business Marketing Strategy*, 17 TUL. J. TECH. & INTELL. PROP. 255, 258 (2014) (noting copyright law’s different approaches to commercial parodies).

153. 18 U.S.C. §§ 2320(a)–(b).

154. See, e.g., Kenneth L. Port, *A Case Against the ACTA*, 33 CARDOZO L. REV. 1131, 1171–81 (2012) (arguing that counterfeit luxury products have a positive effect on their manufacturers).

155. Grinvald, *Resolving the IP Disconnect*, *supra* note 21, at 1497. Although the United States signed ACTA, the agreement has not become effective internationally. *Id.* at 1497 n.22.

By contrast, with respect to commercial parodies, federal trademark and copyright law do not explicitly prohibit unauthorized use of another's trademark for purposes of criticism or commentary. Instead, courts have held that while the First Amendment applies to protect some forms of parody, commercial parodies can still constitute trademark infringement.<sup>156</sup> In copyright law, the reason the prohibition is an interpretative one lies in the fair use defense, which is a statutory four factor test.<sup>157</sup> The first factor considers, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>158</sup> This language indicates that the commercial nature of the work should be taken into account, but does not explicitly state that a commercial work can never be considered fair use. Therefore, the courts have had to interpret this language, and initially, in *Sony v. Betamax*,<sup>159</sup> the United States Supreme Court created a presumption in favor of infringement if the unauthorized use of the copyright at issue was for a commercial purpose.<sup>160</sup> Approximately ten years later, the Supreme Court revisited this issue, criticizing the Sixth Circuit for applying this presumption in *Campbell v. Acuff-Rose Music*.<sup>161</sup> Current jurisprudence remains unsettled, and a number of courts to address the question after *Campbell* have held on either side of the issue.<sup>162</sup> This is an issue ripe for change, and utilizing Professor Kwall's lesson with respect to explicit versus interpretative positions, this Commentary argues in greater detail that the middle group of users needs to work on changing interpretative prohibitions, such as commercial parodies.

#### IV. APPLYING THE LESSONS TO STRENGTHEN USER VOICES

Having drawn the parallels between modern intellectual property law and *The Myth of the Cultural Jew*, this Part applies the three lessons that have been culled from her work. As discussed, Professor Kwall is concerned with the preservation of the Jewish tradition generally, and this Commentary's concern is with the preservation of the

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156. See, e.g., *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 776 (8th Cir. 1994); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397 (8th Cir. 1987); *Gucci Shops, Inc. v. R.H. Macy & Co.*, 446 F. Supp. 838 (S.D.N.Y. 1977).

157. 17 U.S.C. § 107.

158. *Id.* § 107(1).

159. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

160. *Id.* at 449 ("If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.")

161. 510 U.S. 569, 584 (1994).

162. Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After Campbell v. Acuff-Rose Music*, 12 DUKE L. & TECH. REV. 92, 102-06 (2014) (discussing various cases).

sharing culture of the social-media community. If intellectual property holders are given free reign with their restrictive interpretations of the law, either the middle group of users will be pushed to the left and become scofflaws, or the sharing culture will die a death of a thousand cuts.<sup>163</sup> If the former occurs, intellectual property laws may become irrelevant for large swathes of Americans, as some have argued has already occurred with respect to copyright law.<sup>164</sup> And if the latter occurs, something special and unique about the social-media community will be lost. There may be some who believe that this Commentary exaggerates the cultural value of LOLcats,<sup>165</sup> but laughter and creativity both have important societal benefits.<sup>166</sup>

Before providing suggestions on how to make user voices more powerful, it is important to note that this Commentary is simply an addition to the extremely rich commentary already present in the academic literature.<sup>167</sup> This Commentary suggests that we need to actively build up the middle group of social-media users, based on the cogent lessons from *The Myth of the Cultural Jew*. These “middlelists” need to work within the law, as scofflaws will not be taken seriously by intellectual property holders, the courts, or Congress. Finally, a strategy for the middlelists to use is suggested: work first on interpretative prohibitions, such as commercial parody.

#### A. *Creating the “Middlelists”*

The problem with being in the middle is that it is not as dramatic or as cause worthy as being on the left or the right. Being a revolutionary or a traditionalist contains more powerful rhetoric than simple

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163. See generally TIMOTHY BROOK ET AL., *DEATH BY A THOUSAND CUTS* (2008) (exploring the Chinese torture technique of slow slicing). This term has grown to acquire a new definition, one of “creeping normalcy,” as Professor Jared Diamond has described. JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 425 (2005).

164. John Perry Barlow, *The Economy of Ideas*, WIRE, Mar. 1994, at 84, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

165. See Aaron Rutkoff, *With “LOLcats” Internet Fad, Anyone Can Get In on the Joke*, WALL ST. J., <http://www.wsj.com/articles/SB118798557326508182> (last updated Aug. 25, 2007, 11:59 PM).

166. See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1950 (2006).

167. Unfortunately there is not enough space for any type of literature review, but for additional reading on the topic and suggestions on strengthening user voices, please see generally the sources listed in *supra* note 135, as well as the following resources: JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011); Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 THEORETICAL INQUIRIES L. 309 (2011); Gerhardt, *supra* note 11; Ramsey, *supra* note 100; Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?* 26 OSGOODE HALL INTELL. PROP. J. 175 (2014).

moderation.<sup>168</sup> A similar lack of sexiness can potentially impede the creation of a middle group within the social-media community. This Commentary is not advocating for a revolution, rather it is urging incremental changes and a preservation of a culture that has grown organically with the support of the entire community (leftists, middleists, and rightists alike).

This Commentary's proposal for how to create the "middleists" is not earth-shattering, but it is not discussed often enough: more education of social-media users about intellectual property laws from objective sources, similar to Professor Kwall's call for more Jewish education.<sup>169</sup> Intermediaries may have a role here to play—namely the social-media sites themselves.<sup>170</sup> For example, Twitter is somewhat helpful by delineating what is and what is not acceptable through its policies.<sup>171</sup> Improvements to the rules could include additional guidelines of what is meant to "mislead" or "confuse" others as to a brand or business affiliation, possibly through examples of those accounts Twitter closed due to a violation of these policies.<sup>172</sup> Additionally, other social-media intermediaries such as Facebook and LinkedIn, which do not have similar policies, should step in. Further, nonprofit organizations, such as ChillingEffects.org and The Electronic Frontier Foundation, provide valuable educational services to the public about copyright-related issues (and at times, trademark issues as well).<sup>173</sup> More services need to be available to the public, as

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168. See Francis Fukuyama, *The Middle-Class Revolution*, WALL ST. J. (June 28, 2013, 7:51 PM), <http://www.wsj.com/articles/SB10001424127887323873904578571472700348086> (discussing the problems facing middle-class revolutionaries).

169. "Objective" refers to sources that are not necessarily connected to intellectual property holders, such as industry groups or the federal government. For Professor Kwall's call for additional education in the Jewish context, including the use of narrative in such education, see KWALL, *supra* note 24, at 291–94 and the discussion in Part II.B.

170. Of course, Section 512 of the Copyright Act does require intermediaries to respond to intellectual property holders (I thank Scott Boone for raising this issue) in order to escape liability for copyright infringement by their users. 17 U.S.C. § 512(c) (2012). However, not all allegations of copyright infringement are accurate. In fact, the Twitter rules specifically state that "not all unauthorized uses of copyrighted materials are infringements." *Copyright and DMCA Policy*, TWITTER, <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/15795-copyright-and-dmca-policy#> (last visited Feb. 11, 2015). Further, Section 512 does not preclude intermediaries from attempting to change the norms of online behavior.

171. *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311-the-twitter-rules#> (last visited Feb. 11, 2015); *Parody, Commentary, and Fan Account Policy*, TWITTER, <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/106373-parody-commentary-and-fan-account-policy#> (last visited Feb. 11, 2015); *Trademark Policy*, TWITTER, <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/18367-trademark-policy#> (last visited Feb. 11, 2015).

172. *Trademark Policy*, *supra* note 171.

173. See generally CHILLINGEFFECTS, [www.chillingeffects.org](http://www.chillingeffects.org) (last visited Feb. 11, 2015), ELECTRONIC FRONTIER FOUND., [www.eff.org](http://www.eff.org) (last visited Feb. 11, 2015).

well as additional attention highlighting the existence of these services. For example, having a free hotline that allows users to call with specific questions about their uses, or additional law school clinics that provide free or low-cost legal services to those middleists who run afoul of an intellectual property bully, would benefit users.<sup>174</sup>

### B. Working Within the Legal Tradition

This education and low-cost or free legal help is crucial because it will provide the tools that these middleists need to work within intellectual property laws to create incremental change. The next Part will address the strategy of how to accomplish change. But it is important to note that the middleists need to work within the legal tradition—not without. The reason for this is the interdependence of the entire social-media community, as discussed above, which is similar to the Jewish community. Intellectual property holders create the intellectual property shared by users, but it is the users who, through their sharing, validate and give value to the intellectual property.<sup>175</sup> In addition, even the top-down members of the community—the judges, Congress, and intellectual property holders—are also part of the community. While challenges to laws that we believe are unconstitutional or illegal have their place in our society,<sup>176</sup> due to the interdependent nature of this community, changes to intellectual property laws need buy in from intellectual property holders, judges, and Congress.

Many intellectual property holders are fiercely protective of what they see as traditional exclusivity in their intellectual property. Being on the right end of the spectrum, these intellectual property holders will likely seek to maintain this exclusivity, or even push for more exclusiveness. Due to this, those who work outside of the legal tradition can have a negative impact on legal change. As in the Jewish community, where the Reform approach to the question of “who is a Jew” polarizes the approaches on the right, so, too if the middleists attempt to change intellectual property laws by completely flouting them, this may polarize intellectual property holders’ positions. It is important to remember that the legal tradition gives a common language to the community.<sup>177</sup> If the middleists do not work within the law, then they lose common ground with the intellectual property holders, and their efforts will be seen as simply flouting legal tradition.

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174. I defined “trademark bully” in a previous work. Grinvald, *Shaming*, *supra* note 121, at 642.

175. Gerhardt, *supra* note 11, at 1497.

176. See generally PEÑALVER & KATYAL, *supra* note 134.

177. See KWALL, *supra* note 24, at 162.

C. *Strategizing: Changing Intellectual Property Law's Interpretative Positions*

With this law-abiding middleist group established, a good strategy to approaching legal change is useful. Here, the final lesson from *The Myth of the Cultural Jew*, is quite apt. Change is more easily made to interpretative prohibitions than explicit ones. Similar to the prohibition against counterfeiting trademarked products, within social media, counterfeiting a brand or a person is also a fairly explicit prohibition.<sup>178</sup> While there are those who impersonate others on social media for social commentary or parody,<sup>179</sup> this type of use is intended to mislead, confuse, or even prey on those who seek out the real brand or person. Take, for example, the fake “Nine West Auditions” page that was established on Facebook, which claimed it was holding auditions for new Nine West foot models.<sup>180</sup> It asked potential models to send in pictures and other information. It was then exposed as a fraudulent page, but not before over 400 women sent in pictures and personal information.<sup>181</sup> This type of confusion produces real harm, not just to brands (here, Nine West), but also to users. The societal need to prevent this type of harm means that this explicit prohibition will be a pretty tough nut to crack.<sup>182</sup>

On the other hand, there are those who utilize intellectual property not for impersonation, but rather to create humorous social commentary, such as satire or parody.<sup>183</sup> As discussed in Part II.C., an inter-

178. This assumes that the counterfeiter was using a brand name to sell a product. See Ramsey, *supra* note 100, at 872 (noting that trademark infringement becomes questionable when an impersonator is not using the brand name for commercial purposes).

179. Kim Severson, *Fight Escalates over Twitter Parody of N.Y. Food Critic*, INT'L HERALD TRIB., Apr. 24, 2009, at 18.

180. Complaint at 7–9, *Nine W. Dev. Corp. v. Does 1–10*, No. 07-cv-7533 (S.D.N.Y. filed Aug. 24, 2007), available at <http://www.counterfeitchic.com/Cases/cic/3/ninewest.pdf>.

181. Rebecca Tushnet, *Facebook Fraud*, REBECCA TUSHNET'S 43(B)LOG (Dec. 20, 2007), <http://tushnet.blogspot.com/search?q=facebook+fraud>.

182. There are those who impersonate a brand or person for social-commentary purposes, such as Greenpeace's *Let's Go! Shell in the Arctic*, ARTICREADY.COM, <http://articready.com> (last visited Apr. 20, 2015), and they may want to have intellectual property laws loosened for these purposes. In addition, there are now a variety of criminal laws that criminalize certain types of online impersonation. See Victor Luckerson, *Can You Go to Jail for Impersonating Someone Online?*, TIME (Jan. 22, 2013), <http://business.time.com/2013/01/22/can-you-go-to-jail-for-impersonating-someone-online/>. As noted above, Professor Lisa Ramsey has proposed an “impersonation” theory of trademark law which, if adopted by courts, would balance free speech interests with the intellectual property rights of the brand or person impersonated. See generally Ramsey, *supra* note 100.

183. Satire is defined as “a literary work holding up human vices and follies to ridicule or scorn.” *Satire*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/satire> (last visited Feb. 11, 2015). Parody is defined as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.” *Parody*,

pretative prohibition exists in both copyright and trademark laws, stating that if the unauthorized parody is for commercial purposes, then the use of the intellectual property is more likely considered an infringement.<sup>184</sup> The struggle over how to construe commercial parodies reveals the implicit nature of this prohibition, similar to the struggle over allowing more women to participate in synagogue ritual.<sup>185</sup> With current jurisprudence remaining unsettled, this is an issue ripe for the changing, and the recent case of Goldieblox is a good example of how the strategy of changing interpretative prohibitions may work.

Goldieblox is a small business that makes engineering toys geared towards young girls.<sup>186</sup> Its mission is to encourage more young girls to enter into the “STEM” (Science, Technology, Engineering, and Mathematics) fields through playing with these types of toys early on in childhood.<sup>187</sup> To promote one of its products, Goldieblox created and released a YouTube video using the Beastie Boys’ song “Girls.”<sup>188</sup> “Girls” is a song infamous for its sexist and crude lyrics.<sup>189</sup> In the video, three young girls construct a toy while singing to the tune of “Girls,” but with completely different lyrics.<sup>190</sup> For example, instead of “Girls to do the dishes,” they sang, “Girls to build a spaceship.”<sup>191</sup> The video immediately went viral, amassing 8 million views in a very short time frame.<sup>192</sup> The toy became a top seller on Amazon.com, and

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MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/parody> (last visited Feb. 11, 2015).

184. For a discussion of copyright law and the tendency to limit commercial parodies, see Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1024–30 (1997). For a discussion of trademark law and commercial parodies, see 4 LOUIS ALTMAN & MALLA POLLACK, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:61 (4th ed. 2014) (discussing various cases of trademark law and parodies in general, including commercial parodies).

185. See *supra* Part II.C.

186. See *About*, GOLDIEBLOX, <http://www.goldieblox.com/pages/about> (last visited Feb. 11, 2015).

187. *Id.* (“We aim to disrupt the pink aisle and inspire the future generation of female engineers.”).

188. Aaron Taube, *A Small Girls’ Toy Company Claims the Beastie Boys Want To Ban This Video*, BUS. INSIDER (Nov. 25, 2013, 11:12 AM), <http://www.businessinsider.com/goldieblox-issuing-the-beastie-boys-2013-11>.

189. Jena McGregor, *The Brains Behind the Viral GoldieBlox Video*, WASH. POST (Nov. 21, 2013, 2:05 PM), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/11/21/the-brains-behind-the-viral-goldieblox-video/>; see also Alyson Shontell, *A Stanford Engineer Figured Out a Real Reason Fewer Women Code, and a Video She Created About It Has Gone Viral*, BUS. INSIDER (Nov. 20, 2013, 8:15 AM), <http://www.businessinsider.com/goldieblox-girls-video-2013-11>.

190. Dave Itzkoff, *Beastie Boys Fight Online Video Parody of “Girls,”* N.Y. TIMES (Nov. 25, 2013, 9:00 AM), [http://artsbeat.blogs.nytimes.com/2013/11/25/the-beastie-boys-fight-online-video-parody-of-girls/?\\_php=true&\\_type=blogs&\\_r=0](http://artsbeat.blogs.nytimes.com/2013/11/25/the-beastie-boys-fight-online-video-parody-of-girls/?_php=true&_type=blogs&_r=0).

191. *Id.*

192. Taube, *supra* note 188.



Goldieblox ultimately won a competition that gave it a thirty-second commercial spot during the January 2014 Super Bowl game.<sup>193</sup>

Although it is unclear how members of the Beastie Boys voiced their opposition to the use of their song in this commercial parody, Goldieblox took their opposition as a direct threat and filed a lawsuit for declaratory judgment.<sup>194</sup> In its complaint, Goldieblox argued that it was simply making fair use of “Girls,” having created a parody that makes fun of the song and criticizes the message that the original song sends.<sup>195</sup> The Beastie Boys filed a counterclaim and answer, alleging every form of copyright and trademark infringement possible.<sup>196</sup> The group later released an open letter to Goldieblox stating that its primary reason for objecting to the use of its song in Goldieblox’s commercial was that the group had long ago decided to never allow its songs to be used in commercials.<sup>197</sup> For this reason, Goldieblox agreed to settle with the group and to dismiss its lawsuit.<sup>198</sup>

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193. *Holy Axles, We Won!*, GOLDIEBLOX (Jan. 31, 2014), <http://blog.goldieblox.com/2014/01/holy-axles-we-won/>; see also Paul Farhi, *The Rules of the Super Bowl Advertising Game*, WASH. POST (Jan. 31, 2014), [http://www.washingtonpost.com/lifestyle/style/the-rules-of-the-super-bowl-ad-game/2014/01/31/6333b7fe-89f3-11e3-a5bd-844629433ba3\\_story.html](http://www.washingtonpost.com/lifestyle/style/the-rules-of-the-super-bowl-ad-game/2014/01/31/6333b7fe-89f3-11e3-a5bd-844629433ba3_story.html) (discussing the importance of Super Bowl advertising).

194. It is hard to determine whether the Beastie Boys sent an actual cease-and-desist letter because the group claimed that its letter was simply an inquiry into how and why Goldieblox used the song “Girls.” Itzkoff, *supra* note 190. This likely set up an argument that there would be no justiciable claim to sustain a declaratory judgment action see Grinvald, *Policing*, *supra* note 15, manuscript at 31 and muddied the waters by trying to figure out whether the Beastie Boys’ would have attempted to block the video or would have come to some settlement with Goldieblox allowing it to continue the use of the song for noncommercial purposes. Itzkoff, *supra* note 190 (quoting the open letter sent from the Beastie Boys to Goldieblox: “Like many of the millions of people who have seen your toy commercial ‘GoldieBlox, Rube Goldberg & the Beastie Boys, we were very impressed by the creativity and the message behind your ad. . . . As creative as it is, make no mistake, your video is an advertisement that is designed to sell a product, and long ago, we made a conscious decision not to permit our music and/or name to be used in product ads. When we tried to simply ask how and why our song ‘Girls’ had been used in your ad without our permission, YOU sued US”).

195. Complaint for Declaratory Judgment and Injunctive Relief at ¶ 2, GoldieBlox, Inc. v. Island Def Jam Music Grp., No. 13-cv-05428 (N.D. Cal. filed Nov. 21, 2013) (stating that the video was created “to comment on the Beastie Boys song, and to further the company’s goal to break down gender stereotypes and to encourage young girls to engage in activities that challenge their intellect, particularly in the fields of science, technology, engineering and math”).

196. Answer, First Amended Counterclaims, and Demand for Jury Trial, GoldieBlox, Inc. v. Island Def Jam Music Grp., No. 13-cv-05428 (N.D. Cal. dated Feb. 24, 2014) (claiming copyright and trademark infringement, false advertising, unfair competition, and misappropriation of the right of publicity).

197. Itzkoff, *supra* note 190 (quoting the letter).

198. *Our Letter to the Beastie Boys*, GOLDIEBLOX, (Nov. 27, 2013), <http://blog.goldieblox.com/2013/11/our-letter-to-the-beastie-boys/>. However, it is unclear whether the parties have actually settled.

Goldieblox is a great example on multiple levels. First, it highlights the type of social-media “middleist” group that this Commentary is attempting to create: those individuals and entities that know the law and can use it to their benefit.<sup>199</sup> Second, it illustrates the type of use that could be used to overturn the interpretative prohibition on commercial parodies. With all the other factors of fair use in Goldieblox’s favor,<sup>200</sup> the only factor that was not directly in its favor was the commercial aspect of the parody. The reason for this was simply judicial interpretation, which is easier to overturn than explicit statutory language. If enough entities and individuals to fight back against these types of infringement claims, enough cases would be amassed to overturn the interpretative prohibition on commercial parodies.<sup>201</sup> And, then, perhaps, users’ voices would be stronger and louder.

## V. CONCLUSION

Social media continues to thrive. It seems like every day a new service or application aimed at allowing you to share more and more is unveiled.<sup>202</sup> Although this Commentary focuses on the United States, social media is a worldwide phenomenon that continues its exponential growth.<sup>203</sup> This Commentary suggests that social media’s sharing

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199. However, Goldieblox has declared that it will not be a middleist anymore, as it stated in its apology letter to the Beastie Boys that it will obtain appropriate licenses before it creates future videos. The letter also encourages other small companies to do the same. GoldieBlox’s apology was posted on its homepage, but has since been taken down. Simon Dumenco, *Here’s the Apology Letter to the Beastie Boys That GoldieBlox Buried*, AD AGE (Mar. 19, 2014), <http://adage.com/article/the-media-guy/read-apology-beastie-boys-goldieblox-buried/292223/> (“We sincerely apologize for any negative impact our actions may have had on the Beastie Boys. . . . From now on, we will secure the proper rights and permissions in advance of any promotions, and we advise any other young company to do the same.”). This is exactly the type of behavior that this Commentary is concerned with, as it is unlikely that GoldieBlox could have made its video and created such a sensation through obtaining a license.

200. See Fischer, *supra* note 152, at 270–72 (discussing the four-factor analysis of fair use).

201. There are a few of these cases already, but not enough to make a dent in the jurisprudence, as the implicit prohibition still stands. See Gwynne Watkins, *Ask a Lawyer: Who Has the Better Case, the Beastie Boys or GoldieBlox?*, VULTURE (Dec. 14, 2013, 11:00 AM), <http://www.vulture.com/2013/12/beastie-boys-goldieblox-lawsuit-who-will-win.html> (interviewing an attorney about the Goldieblox case who stated, “[I]t can be commercial and still be fair use, and it’s usually going to help if it’s non-commercial, but just because it’s not commercial or just because it’s a parody doesn’t mean that it’s necessarily fair use”).

202. Kyli Singh, *10 Rising Social Networks You Should Explore*, MASHABLE (July 28, 2014), <http://mashable.com/2014/07/28/social-networks-on-the-rise/> (listing ten new social-media applications and Web sites made available in 2014).

203. For example, in 2012, China’s social media sites such as QQ, Qzone, and Sina Weibo had approximately the same number of users as Facebook had worldwide in 2014. Compare Henry Fong, *5 Things You Need To Know About Chinese Social Media*, FORBES (Oct. 25, 2012, 2:02 PM), <http://www.forbes.com/sites/ciocentral/2012/10/25/5-things-you-need-to-know-about-chinese-social-media/> (listing the various sites with monthly user statistics), with Press Release,

culture is a societal benefit that is under attack. Some intellectual property holders want to maintain exclusive control over their intellectual property, but only when they disapprove of unauthorized uses. When they approve of such uses, intellectual property holders are quite happy to be part of the sharing community, and in fact, benefit economically from doing so.<sup>204</sup> Unfortunately for the sharing community, the voices of objecting intellectual property holders are heard more loudly than the voices of the users. This Commentary looks to Professor Roberta Rosenthal Kwall's timely new work, *The Myth of the Cultural Jew*, for answers to the question of how to strengthen social-media users' voices. There are multiple parallels between the struggles within the social-media community and the Jewish community, and Professor Kwall's use of cultural analysis to find answers is extremely relevant. All members of the social-media community, from leftists to intellectual property holders, benefit from sharing. And to share in Professor Kwall's conclusion to her book, "In the end, [we] are all part of the same family."<sup>205</sup>

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Facebook, Facebook Reports Third Quarter 2014 Results (Oct. 28, 2014) <http://investor.fb.com/releasedetail.cfm?ReleaseID=878726> (reporting that as of September 30, 2014, Facebook had 1.35 billion monthly active users).

204. See *supra* notes 11–12 and accompanying text.

205. KWALL, *supra* note 24, at 297.