

# WHAT IF'S AND OTHER ALTERNATIVE INTELLECTUAL PROPERTY AND CYBERLAW STORIES: FOREWORD

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The topic of this Symposium is “What Ifs and Other Alternative Intellectual Property and Cyberlaw Stories.” The inspiration for this topic came from two different sources. The first half of the idea came to me when I was shopping in a bookstore in Hong Kong a few years ago. Around the turn of the millennium, military historian Robert Cowley put together a volume of essays with an eye-catching title, *What If?™: The World’s Foremost Military Historians Imagine What Might Have Been*.<sup>1</sup> Although I am not a fan of military history, the book caught my attention in the bookstore and left a strong impression of the possibilities for imagination and creative historical analysis. *What If?* became a *New York Times* bestseller and was followed by another set of equally, if not more, interesting essays, entitled *What If?™ 2: Eminent Historians Imagine What Might Have Been*.<sup>2</sup> Unlike the first book, this one focuses on non-military events, covering issues that are more familiar and accessible to the general audience.

The second source of inspiration came from a pioneering project led by Jane Ginsburg and Rochelle Dreyfuss a few years ago. In *Intellectual Property Stories*,<sup>3</sup> leading intellectual property scholars retell the stories behind a dozen of the oft-cited cases in their field, such as *Baker v. Selden*,<sup>4</sup> *International News Service v. Associated Press*,<sup>5</sup> *Graham v. John Deere Co.*

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1. WHAT IF?: THE WORLD’S FOREMOST MILITARY HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN (Robert Cowley ed., 1999) [hereinafter WHAT IF?].

2. WHAT IF?™ 2: EMINENT HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN (Robert Cowley ed., 2001).

3. INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

4. 101 U.S. 99 (1879).

5. 248 U.S. 215 (1918).

of *Kansas City*,<sup>6</sup> and *Sony Corp. of America v. Universal City Studios, Inc.*<sup>7</sup> While the stories are handy and important to those who study intellectual property law, and they at times have offered insights that challenge conventional wisdom, the project itself reveals an important recent phenomenon—intellectual property law has come of age, and intellectual property stories are no longer confined to thick, heavy, and expensive law school casebooks. Indeed, as Professors Ginsburg and Dreyfuss acknowledged, “Twenty years ago, it would have been difficult to obtain the participation of fifteen nationally-recognized full-time members of the intellectual property professorate.”<sup>8</sup> At that time, intellectual property law was in the backwater, and intellectual property scholars considered themselves lucky if they were allowed to teach a “niche” course on intellectual property law.<sup>9</sup>

When the two sources are combined together, they inspire a new and interesting project that has not been undertaken before, at least as far as I am aware of. What will happen when a group of leading intellectual property and cyberlaw scholars are brought together to explore how different things could have been had history developed in a different direction? Despite their attractiveness, alternative intellectual property and cyberlaw stories—or “IP counterfactuals,” in short—has yet to be selected as a topic for any major conference, even though other less engaging topics have been addressed—at times at length and in repetition.

Counterfactual reasoning is undeniably fun and seductive, and history is more than “just one fucking thing after another.”<sup>10</sup> As Cowley noted in the opening of his first book, “It has been said that ‘what if?’ (or the counterfactual, to use the vogue word in academic circles) is the historian’s favorite secret question.”<sup>11</sup> Consider, for example, the following alternative stories: what if the Chinese developed intellectual property rights shortly after their invention of paper, ink, and movable type?<sup>12</sup> What if the anti-patent movement prevailed in Germany and spread throughout Western

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6. 383 U.S. 1 (1966).

7. 464 U.S. 417 (1984).

8. Jane C. Ginsburg & Rochelle Cooper Dreyfuss, *Introduction and Overview*, in *INTELLECTUAL PROPERTY STORIES*, *supra* note 3, at 1.

9. See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 924 (2008).

10. ALAN BENNETT, *THE HISTORY BOYS* 85 (2004).

11. Robert Cowley, *Introduction* to *WHAT IF?*, *supra* note 1, at xi. For an overview of counterfactual reasoning, see generally DAVID K. LEWIS, *COUNTERFACTUALS* (1973).

12. Cf. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 1 (1995) (“Although scholars both East and West credit the Chinese with having contributed paper, movable type, and ink to humankind, China has yet to develop comprehensive protection for what is created when one applies inked type to paper.”).

Europe and North America?<sup>13</sup> What if less developed countries were able to restart their technological race with developed countries after resources had been redistributed evenly between the two groups?<sup>14</sup> What if David Johnson, David Post, and other cyberlibertarians were right from the get-go and the Internet was developed along the lines they envisioned?<sup>15</sup> With the change of only one fact, one factor, or one variable, our intellectual property history could have taken on an entirely different path.

Counterfactuals, however, are not just about fun; they are important and useful to both academic and policy debates. As Cowley continued: “What ifs can lead us to question long-head assumptions. What ifs can define true turning points. They can show that small accidents or split-second decisions are as likely to have major repercussions as large ones. . . . They can [even] eliminate what has been called ‘hindsight bias’<sup>16</sup>—a term quite familiar to patent scholars.<sup>17</sup> Indeed, “[c]ounterfactuals and the counterfactual strategy of hypothesis testing play an important but often unacknowledged and underdeveloped role in the efforts of political scientists to assess causal hypotheses,” especially when there are too many variables but too few cases.<sup>18</sup>

Keeping these goals and benefits in mind, the Intellectual Property & Communications Law Program at Michigan State University College of Law brought together a large group of intellectual property and cyberlaw scholars on March 30-31, 2007. Each participant was asked to tell an alternative story about copyright, patent, trademark, cyberspace, media, or international intellectual property law. The event covered a wide range of topics, and the presentations were original, creative, intellectually stimulating, and thought-provoking.

On free speech, privacy, and virtual reality, for example, the conference explored: what if pornography was not eligible for copyright protec-

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13. For discussions of the anti-patent movement, see generally Heinrich Kronstein & Irene Till, *A Reevaluation of the International Patent Convention*, 12 *LAW & CONTEMP. PROBS.* 765 (1947); and Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 *J. ECON. HIST.* 1 (1950).

14. For a comparison between the Old and New Development Agenda, see generally Peter K. Yu, *A Tale of Two Development Agendas*, 34 *OHIO N.U. L. REV.* (forthcoming 2008).

15. Cf. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996).

16. Cowley, *supra* note 11, at xi–xii.

17. See, e.g., Christopher A. Cotropia, *Nonobviousness as an Exercise in Gap Measuring*, in 2 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 1* (Peter K. Yu ed., 2007) [hereinafter *INTELLECTUAL PROPERTY AND INFORMATION WEALTH*]; Joseph Scott Miller, *Nonobviousness: Looking Back and Looking Ahead*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH*, *supra*.

18. James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 *WORLD POL.* 169, 194 (1991).

tion? What if Samuel D. Warren hadn't married a senator's daughter?<sup>19</sup> What if reality were pervasively augmented? And what if Congress and the Supreme Court had been tech-savvy in 1995?<sup>20</sup>

On copyright law, the participants questioned: what if digital rights management (DRM) fails?<sup>21</sup> What if information was alive? What if the anti-bootlegging statutes are upheld under the Commerce Clause?<sup>22</sup> What if the ancient Romans had invented the printing press? What if *Goldstein v. California*<sup>23</sup> had been decided differently? What if *Bach v. Longman*<sup>24</sup> held that music was not protected by copyright? What if the World Intellectual Property Organization (WIPO) Development Agenda is adopted? What if object code had been excluded from protection as a literary work in copyright law?<sup>25</sup> What if man never walked on the moon? What if copyright were really about authors?<sup>26</sup> And what if employees owned their copyrights?<sup>27</sup>

On patent law, the papers examined: what if patents and patent applications weren't published until they expired? What if economists ran the patent office? What if Joe Meigs had written the nonobviousness statute? What if there were a business method user exemption to patent infringement?<sup>28</sup> What if the Free Software Foundation's General Public License (GPL) had been patented?<sup>29</sup> And what if seeds were not patentable?<sup>30</sup>

On trademark law, the speakers wondered: what if the Supreme Court had affirmed in *Dastar Corp. v. Twentieth Century Fox Film Corp.*?<sup>31</sup> What

19. Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage That Led to "The Right to Privacy,"* 2008 MICH. ST. L. REV. 35.

20. Cheryl B. Preston, *The Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995-1997?*, 2008 MICH. ST. L. REV. 61.

21. Jon M. Garon, *What If DRM Fails?: Seeking Patronage in the iWasteland and the Virtual O*, 2008 MICH. ST. L. REV. 103.

22. Michael Landau, *What If the Anti-Bootlegging Statutes Are Upheld Under the Commerce Clause?*, 2008 MICH. ST. L. REV. 153.

23. 412 U.S. 546 (1973).

24. (1777) 98 Eng. Rep. 1274 (K.B.).

25. Susan Corbett, *What If Object Code Had Been Excluded from Protection as a Literary Work in Copyright Law? A New Zealand Perspective*, 2008 MICH. ST. L. REV. 173.

26. Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199.

27. Deborah Tussey, *What If Employees Owned Their Copyrights?*, 2008 MICH. ST. L. REV. 233.

28. Katherine J. Strandburg, *What If There Were a Business Method Use Exemption to Patent Infringement?*, 2008 MICH. ST. L. REV. 245.

29. Greg R. Vetter, *Claiming Copyleft in Open Source Software: What If the Free Software Foundation's General Public License (GPL) Had Been Patented?*, 2008 MICH. ST. L. REV. 279.

30. Elizabeth I. Winston, *What If Seeds Were Not Patentable?*, 2008 MICH. ST. L. REV. 321.

31. 539 U.S. 23 (2003).

if trademarks were “traded in gross”?<sup>32</sup> What if trademark law focused on consumer search costs? What if *eBay Inc. v. MercExchange, L.L.C.*<sup>33</sup> had been a trademark case? What if comparative advertising were infringing? What if *Trade-mark Cases*<sup>34</sup> had been decided the other way?<sup>35</sup> What if trademarks weren’t the ugly stepsisters of intellectual property? And what if there were no First Amendment distinction between commercial and non-commercial speech?

At a more general level, the storytellers queried: what if the stud does not function?<sup>36</sup> What if we used intellectual property rights to impede evil industries? What if WIPO did not exist? What if James Madison were to assess the intellectual property revolution?<sup>37</sup> And what if the proliferation of personal computing had followed the mainframe and terminal model instead of a personal computer model?<sup>38</sup>

All of these topics were addressed at either the Symposium or in this Symposium Issue.<sup>39</sup> The Issue opens with a thought-provoking introductory piece on “What if every ‘if only’ statement were true?”<sup>40</sup> This opening essay was written by my former colleague, Kevin Saunders, who wrote his Ph.D. dissertation on “A Method for the Construction of Modal Probability Logics.” Professor Saunders’s essay is followed by the Fourth Annual Distinguished Lecture in Intellectual Property Law. Titled “Ignoring Patents,” the Lecture was delivered by Mark Lemley, who served as the conference’s keynote speaker.<sup>41</sup> The rest of this Symposium Issue collects papers presented or explored at this Symposium. I hope you will enjoy them.

Because this is my last symposium in my capacity as the director of the Intellectual Property & Communications Law Program, I wish to take this opportunity to thank the past and present members of the *Michigan State Law Review* for their collaboration in putting together four major

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32. Irene Calboli, *What If, After All, Trademarks Were “Traded in Gross”?*, 2008 MICH. ST. L. REV. 345.

33. 547 U.S. 388 (2006).

34. 100 U.S. 82 (1879).

35. John T. Cross, *The Lingering Legacy of Trade-mark Cases*, 2008 MICH. ST. L. REV. 367.

36. Peter Bowal & Christopher Bowal, *What If . . . the Stud Does Not Function?*, 2008 MICH. ST. L. REV. 389.

37. Liam Séamus O’Melinn, *What If James Madison Were to Assess the Intellectual Property Revolution?*, 2008 MICH. ST. L. REV. 401.

38. M. Scott Boone, *The Past, Present, and Future of Computing and Its Impact on Digital Rights Management*, 2008 MICH. ST. L. REV. 413.

39. The final program of the Symposium is available at <http://www.peteryu.com/conference07.htm>.

40. Kevin W. Saunders, *What If Every “If Only” Statement Were True?: The Logic of Counterfactuals*, 2008 MICH. ST. L. REV. 9.

41. Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19.

symposia in the past four years.<sup>42</sup> While the conference topics have ranged from domestic to international and from eclectic to time-sensitive, the efforts from each editorial board have been consistently superb. The editors were professional, highly reliable, and amazingly patient. Each of them was a pleasure to work with, and one cannot find a better group of collaborators. I am therefore very proud that the Inaugural Symposium has graced the opening pages of the *Review*'s first full volume under the current and hopefully permanent name, *Michigan State Law Review*.<sup>43</sup>

In addition, I would like to thank my colleagues, friends, and co-conspirators—the two Adams (Adam Mossoff and Adam Candeub)—for their immense support and for being there since the Inaugural Symposium. It seems only yesterday when my colleagues and I were amazed by the number of speakers, conference fellows, and participants that could be packed into the Castle Board Room in a cool March weekend in East Lansing. The many ideas they brought to the Program have made the events diverse, exciting, and especially enjoyable. The present Symposium and previous three symposia were the fruits of this collaborative enterprise.

Last but not least, thanks go to Dean Terence Blackburn, who convinced me that Michigan State University would be a nice place to build a new intellectual property law program. (It was, indeed.) He also provided the Program with a tremendous amount of administrative, financial, and spiritual support. Without this support and his active participation (most notably in hosting large groups of speakers for dinner receptions in his house),<sup>44</sup> the past symposia would not have been as memorable. The Pro-

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42. Symposium, *What Ifs and Other Alternative Intellectual Property and Cyberlaw Stories*, 2008 MICH. ST. L. REV. 1; Symposium, *The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1; Symposium, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age*, 2006 MICH. ST. L. REV. 1; Symposium, *Intellectual Property, Sustainable Development, and Endangered Species: Understanding the Dynamics of the Information Ecosystem*, 2005 MICH. ST. L. REV. 1.

43. Dating back to June 1931, the *Review* started as the *Detroit Law Review*, which ceased publication in June 1948. It resumed publication under the name *Detroit College of Law Review* in 1975. With the move from Detroit to East Lansing after the Detroit College of Law became affiliated with Michigan State University in 1995, the journal took the name *Detroit College of Law at Michigan State University Law Review*. Its name changed again in 1999 to *The Law Review of Michigan State University–Detroit College of Law*, followed by another change to *Michigan State DCL Law Review* in 2003. The journal assumed its current name, *Michigan State Law Review*, in the final issue of the 2003 volume. See Michigan State Law Review, Citation Information, [http://msulr.law.msu.edu/cite\\_history.html](http://msulr.law.msu.edu/cite_history.html) (last visited May 2, 2008).

44. Thanks also go to my friend and former colleague, Catherine Dwyer, who has been an equally fabulous and supportive host.

gram also would not have become one of the top programs among the Big Ten schools in such a short period of time.<sup>45</sup>

I hope you have enjoyed reading these symposia and being part of the Program, and I wish the *Law Review* continued success in its endeavors. Go Green, Go White, Go Spartans!

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45. Press Release, Mich. State Univ. Coll. of Law, MSU College of Law's Intellectual Property and Communications Law Program Nabs Number One Ranking Among Big Ten Law Schools, 17th Ranking in Nation's Top 20 (Apr. 4, 2006).