

**IM 450-01**  
**Intellectual Property Law and New**  
**Media**  
**Fall 2022**  
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**Class 23**


**Chapter 11**  
**Now and Then**


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**Creativity and innovation are among  
citizens' intellectual property rights**




**The IP laws that apply to you and me  
weren't made, and don't work  
for, you and me**


 **IP law is written for large, corporate, content-and-rights-holding industries. Traditional media industries are better able to leverage the intellectual property regime than are everyday citizens.**

 **User law is scant; most legislators are both uninterested in the plight of common citizens and are, instead, generally supportive of the stronger controls advocated by corporate and industrial interests.**

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 Practices that appear, to large, corporate, content-rich industries, to be protective of (their) intellectual property rights, often constrain and/or sanction the digital activities of common citizens in ways that seem to inhibit rather than encourage creativity and innovation.


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 **In the arenas of intellectual property law into which they now find themselves thrown, every person stands, largely, alone, at risk, and lacking legal empowerment for much beyond passive consumption of media content.**


 **Passive media consumption does not match the hopeful goals envisioned by new media pioneers at the dawn of the age of information.**

# **The IP laws that apply to you and me weren't made, and don't work for, you and me**

 Likewise, passive media consumption does not map accurately on the territory of the current state of the citizenry who are networked owners of powerful media production technologies, and often, have strong inclinations toward the active production of popular culture.

 The inability of intellectual property law “To promote the Progress of Science and useful Arts” among the common citizenry strips the culture of creative and innovative energies in contradiction to the goals of IP law in the first place as well as citizens’ creative potentials.

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 **As noted by Christopher May, the status quo serves the purposes of specific interests, largely by appearing to be the only rational approaches to protecting the development of innovations and knowledge. However:**

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**'the narratives of justification that underpin intellectual property are neither natural nor self-evident, and, most importantly, they are not the only possible ways of thinking about valuable knowledge, of how creative and inventive activity can be socially stimulated, encouraged, or incentivized. The limitation of the mainstream debate to a narrow range of choices has been supported by the mobilization of power over knowledge that has limited the recognition of alternatives to IPRs [intellectual property rights], to the advantage of particular powerful groups in the global political economy.'** (13)



## **Eight Change Proposals: 1**

**The length of the copyright terms seems unreasonable.**

**The shorter term for patent protection appears to function more closely in line with the constitutional mandates than do the longer copyright terms. Although trademark protection may be renewed in perpetuity (as long as the owner is using the mark in commerce), registration requirements avoid unused marks falling into orphaned works status—instead, they become “DEAD.”**

# **Eight Change Proposals: 1**

## **The length of the copyright terms seems unreasonable**

**Both the patent and trademark protocols provide adequate rights protection while encouraging creativity and innovation. Enclosing the public domain and the creation of untold numbers of copyright orphaned works are unhealthy second order effects of the unnaturally long copyright terms. Further, justifications for the extended terms often seem little more than weak accounts for legacy lawmaking (as was demonstrated in Eldred: Congress has the authority to extend the terms, so let's not constrain them from doing so).**

# **Eight Change Proposals: 2**

## **Transformational standards for fair use and the Derivative rights extended by copyright law cannot continue in contradiction.**

- **One or the other set of principles must be extended, clarified, and prevail. A constant state of vague co-existence advantages no one, except (perhaps) intellectual property lawyers.**
- **The SCOTUS *might* clarify the situation via fair use analysis in the Warhol case, but they are unlikely to modify the “transformational” standard itself.**

## **Eight Change Proposals: 3**

**Far too many wrap contracts and DRM schemes either impinge on, or threaten to impinge on, citizen rights.**

**DRM, shrink wrap/click-through agreements (wrap-contracts), website terms of service, software end-user agreements, and the DMCA-mandated anti-circumvention strictures can, and too often do, err on the side of protecting content-rich industries at the cost of damaging citizens' rights.**

# **Eight Change Proposals: 4**

## **Software patents and Business process/methods Patents are of questionable/contestable value**

**One can make strong arguments that protecting software and business processes/methods have led to far more confusion than clarity, have added enormous costs to research and development, and have more restricted than advanced innovation and creativity.**

## **Eight Change Proposals: 5**

**Everyday search protocols operating the WWW are in seemingly obvious contradiction with the goals & purposes of trademark laws.**

**Although the courts may be, largely, correct by interpreting the letter of the law that online search and advertising protocols do not directly violate trademark laws, one cannot but wonder how searching for company X's product/service, but finding company Y's product/service, because company Y bought the search term X for the day, isn't a fairly straightforward instance of company Y leveraging company X's trademark in ways that trademark laws are supposed to forbid.**

## **Eight Change Proposals: 6**

**Common citizens' personae are now widely distributed in commercial media contexts; This clearly warrants changes to the intellectual property tort laws.**

**Citizens' personae are now almost constantly involved in activities across all three domains presented in this volume: the right of publicity, defamation, and rights of privacy of the person. Intellectual property law, however, has not evolved quickly enough to account for realities.**

## **Eight Change Proposals: 6 (cont)**

**For example, the well-intentioned safe harbor that protects ISPs and web service providers from third-party-induced liabilities provides the wanted protection for industries but does not provide sufficient protection or redress for parties who are injured by online communication.**

**Further, adhering to state-law-based jurisprudence for lawlessness and injuries that know no geographic boundaries provides a strong motive for federal legislation.**



# **Eight Change Proposals: 7**

## **International Trade Agreements should not be used to force the enactment of domestic IP legislation**

**Using (relatively) secret international trade negotiations to accomplish changes that, if merited, should be enacted by way of domestic legislation, is unhealthy for the US political system and leads to legislation that is (usually) not in the best interests of common citizens.**

## **Eight Change Proposals: 8**

**The reality of new media in the everyday lives of common citizens must be met with interest and involvement on the part of elected representatives/lawmakers**

**Developing equitable and up-to-date intellectual property law resides in the hands of the representatives of the people. Those citizens are now empowered with the means of production and distribution.**

**Elected officials should no longer be able to shrug off interest and involvement by claiming that technology is too complex or that they don't sit on the proper committee.**

## **Eight Change Proposals: 8**

**Intellectual property laws are now the people's business and we need elected representation in the process that is directly responsible to voting citizens.**

**Lobbyists and other industry representatives will always be involved on behalf of big content. Money influences our political processes.**

**One caveat: Often, making more laws results in making more problems. More legislation is not always better legislation.**

## **Eight Change Proposals: 8**

**Still, intellectual property law no longer applies, mostly, to “them.” Under new media, intellectual property law involves each of us.**

**When the legal regime supports a system that applies a fee to knowledge activities that should be free, every citizen suffers and our national spirit is deprived of the innovation and creative production our founders set out to encourage.**

# **17 [class 24] *Proposals 1, 2, and 3***

***What say you?***

**p.s. “I agree” “I disagree” are insufficient answers.**

**Rather than agreement/disagreement, I want you to provide justifications for agreeing or disagreeing with my analyses and the changes they imply.**