

IM 450-01
Intellectual Property Law and New Media
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**Introduction to intellectual property issues in
new media environments**

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Nine Key Issues

- 1. After 1976/1988, no copyright (re)registration.**
- 2. Copyright Extension Act of 1998 added twenty years.**
 - These two produce an enormous number of orphans as only about 20% of all content is valuable enough for registration/re-registration if we had it.**
 - During the delay, everything was treated equally so the stuff that no one cared about (wouldn't make money) got locked up too.**
 - Corporations hold most (of the valuable) IP content; they don't want to go back to registration because the process costs them T&E & \$.**
 - The extension expired after 2018 and was not renewed so older materials are starting to trickle into the public domain.**

Nine Key Issues

- 3. DMCA contains anti-circumvention requirements.**
 - IP laws are supposed to be about infringement.
 - The DMCA created crimes *prior to/other than* infringement.

- 4. A LARGE number of court cases have validated “click through/shrink wrap agreements” (wrap contracts)**
 - It’s clear that few users read click throughs/shrink wraps, TOS, or EULAs and that even if they did, they could not understand them.
 - In most contract law, this might obviate their strength. Not in digital cases.
 - Also, age restrictions to contracts don’t much/enough apply in digital.

Nine Key Issues

5. DRM looms large and can work at the “pre-infringement” levels and choke-points.

- Joined with items already covered, this could come to mean “if you don’t navigate and use the stuff the way we tell you to, you are circumventing our content controls.”**

6. Politicians don’t like to get involved and there is little or no “user law.”

Nine Key Issues

7. Patents now go to “first to register” (changed from “first to invent”). This probably advantages the biggest players.

8. Government surveillance and corporate data collection for targeted marketing compromise privacy of the person (a slightly different right than the “privacy” we focus on in the 450-Privacy class).

9. Search protocols have deeply compromised the value of trademarks in the online environment.

The Clause

“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

- 1. It’s important to remember that copyright and patents are in the Constitution.**
- 2. To what degree does the present regime adhere to these principles?**
- 3. Especially: “To promote the Progress of Science and useful Arts.” Some of our IP protocols appear to stifle “progress” in favor of in-place content holders and innovators (big corporations).**

- **Lay people struggle or just ignore the law.**
 - **The laws are difficult to understand and hard to “follow.”**
 - **The deck seems stacked against “we the people.”**
- **The “conservators” of our intellectual culture—libraries, schools, museums also struggle.**
 - **They make content available but must operate within the laws.**
 - **How will we collect and protect our cultural heritage?**
- **Can we trust tech corporations to solve these issues?**
- **Both judicial and legislative processes can take a LONG time. New media developments move QUICKLY.**

Quick review of IP categories

We'll cover each category in detail, later, so this intro. isn't "deep."

The reading assignment for Day 3 (next class) briefly introduces the IP categories as well as introducing basic legal & judicial processes (*F-4-F*, "Introduction" 10-24).

Remember: The descriptions apply to US law only. While the categories and some of the principles may overlap with practices in other countries, this is US law. Stop me if you have a question.

Copyright

- Applies to literal expression (not to the underlying concept/idea).
- Life of the author plus 70 years (the “Sony Bono” extension was upheld in *Eldred*).
- 95 or 120 years in works made for hire.
- Original Works of Authorship:
 - Literary, Dramatic, Musical, Artistic
 - Careful: the system used for music varies from the norm. It uses the underlying system (one gets a copyright the same way), then varies it with license and royalty aspects (others can make use of the material differently than for non-musical stuff).

Copyright

- **A copyright is established when the author fixes the work in a tangible medium of expression**
 - **Pen to paper; musical notes to sheet; material to digital file**
 - **Performance only qualifies SOME of the issues (as performance itself isn't set to form) so only sometimes establishes a copyright.**

Copyright

- **Additional rights (ability to sue for damages & fees) follow with display of the symbols and registration.**
- **Registration enables recovery of damages, fees, and an injunction.**
- **Submit Form, \$35.00 [if online], copy to US Copyright Office.**
 - **There is a provision in the Copyright Act, the Visual Artists Rights Act, which codifies what have been called an artist's moral rights (to attribution and to maintain the integrity of the work). An artist who has rights under VARA can enforce them without having registered the works.**
 - **This applies to artists who make physical stuff that doesn't easily accommodate symbolization and/or appeared (and was copied in an infringing way) before (or in the absence of) registration.**
 - **Not usually appropriate for digital products.**

Copyright

- **Don't think of copyright as ONE right. It's a suite of rights.**
- **Grants exclusive rights to:**
 - **Reproduce**
 - **Distribute**
 - **Make derivative works (many issues here)**
 - **Publicly perform/display works**

Liabilities for infringement

– Penalties could include:

- Fines not less than \$750 or more than \$30,000**
- Fines up to \$150,000 for willful infringement**
- Actual damages and any profits made by infringement**
 - Initial Thomas case award (80,000 each song)**
 - Initial Tannenbaum case award (40,000 each song)**
- Without timely registration, only actual damages (loses) can be recovered (and the cases usually cost way more than that)**

Safe Harbor from Copyright Infringement

- **The DMCA specifies procedures protecting ISPs and web operators from liability for content posted by 3rd parties.**
- **Do NOT confuse this DMCA/copyright safe harbor with the CDA Section 230 safe harbor against civil liabilities (defamation and the other torts). They are totally different laws.**
 - **DMCA= copyright**
 - **CDA section 230= Defamation (tort infringements)**

Trademarks

- **Trademark: Protecting the marks/symbols of identity for representational clarity.**
 - **Identifying word or logo (can also be a color, sound, package shape, or smell)**
 - **Public Use In Commerce required to get one**
 - **State or National registrations available**
 - **Term: 10 years, renewable**
 - **E.g. Clorox, Kodak, Ivory**
 - **URLs, domain names, search terms and meta- tags are trademark issues**
 - **Trade dress (associated with trademark law)**

Patents

- **Patent: utility/design/plant: protecting inventions and discoveries.**
 - **Lately, includes business processes (contested).**
 - **Software is included (contested).**
 - **“Design” patents, in media, are now at issue/contested.**
- **Originally (the Constitution) treated patents with copyright. Soon thereafter, split out.**
 - **New, useful, not obvious device.**
 - **Disclosure to PTO.**
 - **20 year exclusivity.**
 - **Prevents others from making, selling, using; Does not “guarantee” that the holder can!**
 - **Proper filings protect against foreign imports.**

Patents

- **In American law, patents are only assignable to identifiable entities (people & corporations). This effects the way(s) we treat “native” people and their “stuff.”**
- **Currently also rules out “machine-invented” (created by AI).**
- **As the new law took effect in March, 2013 we changed from “first to invent” to “first to file” (a change that probably advantages large, corporate entities over small businesses and individual inventors).**

Trade Secrets

- **Not “registered” anywhere.**
- **Information**
 - **With economic value**
 - **Not generally known**
- **Reasonable efforts to maintain secrecy**

Trade Secrets

- **Non-disclosure and non-competition agreements fall within the purview of trade secret law**
- **Unfair competition legislation (is often associated with trade secret law)**
- **State laws; all but NY are in rough compliance with the federal Uniform Trade Secrets Act (but are still stage laws)**

Content Torts

- **Rights of Publicity**
- **Invasion of Privacy**
 - privacy, in general is not an IP issue; privacy surrounding personal identity can be
- **Defamation (libel/slander)**

Rights of Publicity

- **Right to control one's image, especially in commercial environments.**
- **Based on state statutes**
- **California and New York lead the way; Illinois also has a statute as do some other states.**
- **Generally involve celebrities (due to the relative value of their image/celebrity).**
- **However, the law applies to everyone and in this Internet age, non-celebrities are implicated and protected in more instances than earlier.**

Invasion of Privacy

- **Most privacy issues dealing with surveillance are not IP issues.**
- **IP privacy applies to certain issues of personal identity**
 - **Portraying someone in false light**
 - **Intrusion into the seclusion of another**
 - **This part might/can be related to surveillance issues--but focuses on the person controlling their personae (rather than purely about “privacy”).**

Defamation

- **False Statement of Fact**
- **Causing damage to reputation**
- **It's somewhat difficult to defame a celebrity (though it IS possible)**
- **It's MUCH more difficult to defame a public official or the organization they run.**
 - 1st amendment law “controls” many defamation cases.
 - 1st amendment isn't an IP issue as such

Tort Safe Harbor

- **The Communications Decency Act (section 230) provides ISPs and web providers safe harbor from violations (usually defamation) in content posted by 3rd parties.**
- **The CDA procedures are NOT the same as the DMCA copyright procedures**
 - **For example there are no take-down procedures under the CDA/230.**
 - **However, the protections for ISPs/web providers (safe harbor from 3rd party content) are similar.**
- **Protection DOES NOT apply to the defamer.**
- **HOT political issue these days.**

We will also examine:

- **Open Source (software) and Open Access (publishing).**
- **International IP (all of the types, across many jurisdictions and systems).**
- **Digital Rights Management (lockdown and lock out schemes).**
- **IP law in games and virtual environments (all of the previous issues X [times] almost infinity).**
- **And of course, quite a bit about the ways that IP laws are made and the ways those laws work out in court cases, across history and geography.**
- **Numerous emerging trends in new media IP law.**