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***715** WHEN BIAS IS BIPARTISAN: TEACHING ABOUT THE DEMOCRATIC PROCESS IN AN INTELLECTUAL PROPERTY LAW REPUBLIC

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Introduction

Intellectual property law courses offer law professors the opportunity to teach a subject area rich with complicated statutory and court-made doctrines about which students do not usually have strong or extensively delineated moral views. [FN1] It also gives everyone in the classroom a refreshing break from the traditional partisanship of political party politics. Identification as a Democrat or Republican does not provide too much guidance or create too many expectations about a person's views of intellectual property issues, freeing classroom debates from the constrictions that political loyalties impose in so many other contexts. [FN2]

***716** I. Bias and Barrier Height

Some of the fiercest policy debates in academic intellectual property law are over the proper level of monopolistic protection the legal system should provide for copyrights, patents, and trademarks. [FN3] They are often rhetorically framed as arguments about how high the barriers should be that the law constructs around specific copyrighted works, patented inventions, and trademarks. [FN4] Low barriers constitute low levels of protection, while high barriers metaphorically fence out competitors more effectively and dramatically. Therefore, one way to approach the theoretical underpinnings of intellectual property law is as a series of questions about where the barriers should reach, and why. Almost every law student can, where necessary, be moved out of an "all copying is evil" mindset sufficiently to participate. [FN5] This can be accomplished by reminding students that they have used block quotes taken from copyrighted works in their academic papers; have picked out ***717** copyrighted tunes on musical instruments and spontaneously sung "Happy Birthday"; [FN6] have read or listened to copyrighted poems at graduations, weddings and funerals; have said "kitty litter" when they meant "cat box filler" and have talked about "xeroxing" when the photocopier at issue was a Cannon; or have moved a swing from side to side on the playground. [FN7]

Intellectual property law classes are tremendously fun to teach, and to some extent they provide a respite from pedagogical burdens other subject areas impose. At a religious school, for example, even when infusing godliness into the curriculum is a stated goal of the institution, the intellectual property law teacher is probably excused from espousing (for example) the Christian views of trademark, patent, or copyright law, whatever they may be. While it certainly isn't the case that intellectual property laws are outside the purview of social justice concerns, [FN8] those they raise are generally less potentially cataclysmic to clients than a failed death penalty appeal, a badly flawed child custody decision, or an unsuccessful bankruptcy reorganization that leads to homelessness and financial ruin.

For many practitioners, intellectual property constructs need to be temporary, and pragmatism triumphs over dogmatism. Views about intellectual property rights need to be tenuously situated, because in a very immediate

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way, today's plaintiff can be tomorrow's defendant. The writer who sues to prove that another's novel too closely parallels her own can find herself accused of copying from someone else with respect to the very same work of fiction. In consequence, parties to intellectual property litigation will strategically deploy "principles" that are couched in the rhetoric of ethics and morality, but repeat players are unlikely to do so consistently. For example, the defendant asserting the importance of placing First Amendment-based expressive freedoms over copyright concerns [FN9] and arguing for a postmodern approach to authorship [FN10] today may well be arguing that unauthorized literal copying cannot constitute fair use [FN11] tomorrow, or possibly even contemporaneously. For reasons including, but not limited to, potential ***718** conflicts of interest, employment lawyers typically represent only labor, or only management, and personal injury lawyers stick to either plaintiffs' representation or torts defense work. Intellectual property lawyers, however, can do either, in an atmosphere of far less polarity, but with consequentially diminished doctrinal coherence when assessed holistically across clients and careers. [FN12]

Intellectual property law disputes are primarily about money and legal control mechanisms over creative or inventive works that facilitate the accumulation of money, or fail to. Many of the effective teaching cases provoke debates about freedom of speech, property rights, and marketplace competition issues. At a theoretical level, the law is supposed to calibrate intellectual property rights using a balancing approach. Inventors and creators are supposed to receive enough monopoly control over their works to reward them for doing something new and useful, and to incentivize future efforts, but no more than that. [FN13] The myriad ambiguities concerning the scope of intellectual property rights constitute a sort of Full Employment Act for intellectual property lawyers.

In my experience, few students come to intellectual property law classes with deeply entrenched views about the doctrines they will learn. If you teach abortion rights cases in a required Constitutional Law class, you can reasonably expect that most of the students who previously expressed liberal-leaning views on other topics to support abortion rights, and most of the conservative students to oppose abortion rights. Abortion is a controversial topic, about which many people hold passionate views that they will express with great emotion. If you are one of those law professors who believes that your job is to lead the students to some neutral Truth, you are especially likely to encounter a lot of resistance on this topic from students whose truth is different than yours. [FN14] You may not notice it while teaching, as some of the students with acute emotional investments in one side of a debate may decline to participate in classroom conversations in any way other than rote attempts to give the professor whatever answer she probably wants, so that she will move on. But you will surely read allegations about your biases and perceived unfairness in your student-authored teaching evaluations. The usual absence of a rigid pre-existing set of moral imperatives freighting policy conversations is very liberating for the typical law professor, especially those of us who have ***719** strong political beliefs that are very different from those typically held by our students.

II. The Apolitical Politics of Intellectual Property Law in the Classroom

Another of the many interesting things about intellectual property law is that the political schisms within the field are not along traditional party lines. Neither the Democratic nor Republican parties have fixed or coherent platform positions on intellectual property that reflect overarching party policies. Unlike an issue like abortion, where comparisons of national party platforms reflect deep partisan schisms, [FN15] intellectual property laws offer opportunities to study and teach about political divisions that obfuscate and sometimes transcend traditional party-based political divisions.

Whether one political party is more in favor of high barriers intellectual property protections than the other

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poses an interesting but probably unanswerable series of questions. Republicans are sometimes seen as being more "pro-property owner rights" than Democrats. However, Democrats are often viewed as being more supportive of government regulation than Republicans are, and intellectual property can't even exist, no less be protected for the benefit of its owners, without substantial amounts of government regulation and intervention in the marketplace.

Is one party more in favor of low barriers intellectual property protections? [FN16] The idea that people should have unfettered access to intellectual property for at least some purposes without compensating or obtaining permission from the intellectual property holder as a matter of public interest is a liberal one, and certainly liberalism is associated with the Democratic Party. On the other hand, the "information wants to be free" ethos that favors individual freedom to access, process, and repurpose information has a decidedly libertarian aspect. Libertarianism is generally in tension with liberalism, and associated with a mindset that rejects interventionism by governmental actors into commercial transactions.

A. Copyright Law

Copyright law offers one paradigmatic view of the power of constituent interests. The Democratic Party receives a substantial amount of financial ***720** support from many sectors of the entertainment industry, members of which have often received copyright legislation that favors their interests. [FN17] Many Democratic politicians have promulgated extremely "high barrier" approaches to copyright law, notably including former President Bill Clinton, who appointed Bruce Lehman to the position of Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. [FN18] Lehman oversaw the drafting of the infamous White Paper, [FN19] which prompted strong criticism from some intellectual property law scholars, [FN20] who sometimes got accused of bias themselves. [FN21]

Republicans are unpopular with some sectors of the entertainment industry because non-libertarian Republican politicians are perceived to be more in favor of content-based content regulation, and sometimes even censorship, than Democrats (though there are certainly exceptions, such as Tipper Gore, who was involved with efforts by the Parents Music Resource Center (PMRC) to convince the music industry to develop guidelines and/or a ratings system ***721** similar to the Motion Picture Association of America's film ratings system). [FN22] The country music establishment, however, is predominantly Republican, according to some observers. [FN23]

Tracking the behavior of Congress belies a party-based divide on copyright policy. The House of Representatives' Committee on the Judiciary has a Subcommittee on Courts, the Internet, and Intellectual Property. [FN24] The current chair of this Subcommittee is Howard Berman, a Democratic Representative from California. [FN25] He took over from Howard Coble, a Republican from North Carolina, [FN26] when control of the House switched from Republican to Democratic in 2006. [FN27] Though hailing from different coasts and different parties, Berman and Coble hold views of intellectual property in close enough alignment that in 2002 they introduced the "Berman-Coble Bill," [FN28] to "free the marketplace to develop technologies that thwart P2P [peer-to-peer] piracy without impairing P2P networks themselves . . . . by allowing copyright owners, in certain limited circumstances, to use technological tools to thwart P2P piracy without fear of liability." [FN29] As with the initiative's supporters, opponents of the bill came from both sides of the aisle, and from interested parties across the political spectrum. [FN30]

***722** Rather than party politics, the copyright-related activities of congress members appears to be influenced primarily by the interests of their constituents. Senior Google attorney Bill Patry has argued that Berman's

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views about copyright law in particular are driven by the expressed desires of his constituents, writing: "Mr. Berman is unabashed that his constituents have a great interest in copyright and that he sees his role as protecting their interests. That is, of course, why the public elects members of Congress: to further their interests. Mr. Berman is doing what his constituents expect, and rightly so." [FN31] To follow this argument to one possible logical extension, the politics of intellectual property reflect a democratic process that functions correctly in the sense that positions are formulated by interested parties rather than political parties. Whether Patry's view is correct on the merits is a subject for another day. He is almost certainly right that Berman's actions were motivated by goals and interests outside of those that were articulated within the four corners of the 2004 Democratic National Platform. [FN32]

Twenty years ago, after exhaustively researching the multi-decade legislative history of the Copyright Act of 1976, Jessica Litman wrote:

> Members of Congress revised the copyright law by encouraging negotiations between interests affected by copyright, by trusting those negotiations to produce substantive compromises, and by ultimately enacting those compromises into law.
>
> This process yielded a statute far more favorable to copyright proprietors than its predecessor, containing structural barriers to impede future generations' exploitation of copyrighted works. The legislative process may have struck an unwise balance, but it, nonetheless, is a balance that members of Congress and myriad industry representatives worked many years to achieve. It is also a balance around which the represented industries have since structured their relationships. [FN33]

Because so much of the tussling over the ultimate formation of the Act was delegated to interest groups, both political parties were arguably able to stay more removed from the debates than would otherwise be expected in a process that was so long and contentious. Congress also leaves a lot of copyright lawmaking to the federal courts. As with members of Congress, labels like ***723** "liberal" or "conservative" that are often appended to judges have a lot less meaning in the context of intellectual property law than they do in other legal subject areas.

To illustrate with a personal observation: in the ordinary course of events I tend to emphatically agree with many of the votes and written opinions, concurrences and dissents, of Justice Ruth Bader Ginsburg. She's "my Justice," the only woman currently on the Court, and the only woman who seemed to consistently represent women's interests even when Sandra Day O'Connor was her colleague. I find it painfully ironic that the one area in which I most fiercely disagree with her jurisprudence is one of my primary scholarly areas, copyright law. Though I think she is both wonderful and brilliant, I also think she was egregiously wrong in her Eldred v. Ashcroft opinion. [FN34] I won't go into the specifics of why here, but when I harshly criticize her conclusions in this case, it's hard for my students to fairly accuse me of having a pervasive "liberal bias" on intellectual property issues.

The two dissenters in Eldred v. Ashcroft were Justices Stevens and Breyer. [FN35] Though appointed to the Court by a Republican president, Justice Stevens has recently been called "arguably [the] most liberal justice," [FN36] and his jurisprudential writings on a wide range of topics such as abortion, [FN37] school desegregation, [FN38] and the death penalty [FN39] substantially parallel my own views. [FN40] While in my opinion he got Eldred right, I can't say the same for his majority vote in Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc., [FN41] which is one of the worst copyright decisions ever, due to its incredibly constricted view of fair use. As Justice Brennan noted in his dissent, the majority held that "The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that

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manuscript, even though the quotations related to a historical event of undoubted significance-- the resignation and pardon of President Richard M. Nixon." [FN42] This, he noted, constituted an "exceedingly narrow approach to fair use" that "permit [ted] Harper & Row to monopolize information," effecting ***724** "an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas." [FN43]

One inveterately left-leaning Justice who declined to sign onto Justice O'Connor's fair use and First Amendment-endangering opinion in Harper & Row was Justice Thurgood Marshall. Not unexpectedly, Marshall joined Brennan's dissent in this case. [FN44] Because these two Justices voted together so often, I have law professor friends who sometimes jokingly refer to them as "Justice Marshallbrennan" or "Justice Brennanmarshall," as if they were a single person. Though they didn't always agree, they voted the same way far more often than not. [FN45]

My son's middle name is "Brennan" in honor of Justice Brennan, but if life had given me the opportunity to bestow a moniker upon a second boy, his middle name would have been Marshall, so profoundly do I similarly respect Marshall's judicial legacy. [FN46] So it is with some consternation that I note that a mere year before Harper & Row was decided, in arguably the most important copyright case of the twentieth century, Sony Corp. of America v. Universal Studios, Inc., [FN47] while Brennan joined Stevens's convoluted and confusingly written but doctrinally correct majority opinion, [FN48] Marshall was one of four spirited and deeply incorrect dissenters. [FN49] When Marshall and Brennan split on an issue, it's clear that the politics of an issue are not along traditional divides. In 1989, Marshall wrote an excellently reasoned opinion for a unanimous Court in yet another copyright case, Community for Creative Non-Violence v. ***725** Reid, [FN50] illustrating once again the unpredictability of judicial reaction to copyright law issues.

B. Patent Law

Interpreting patents too narrowly inadequately rewards a patentee and may discourage future innovation. Designating too broad a scope for patent monopolies, however, may over-reward relatively insignificant innovation, fence competitors out of productive, potentially lucrative terrain, and dissuade other inventors from conducting research in a particular area. As described above in the context of copyright law, government actors will necessarily formulate rough ideas about the appropriate balance between protecting patent holders' rights and upholding the freedom to compete, which can also lead to rapid and productive innovation. Different legislators, judges, and administrative functionaries may have a wide range of opinions about how strong patent monopolies should be, but as with copyright law, it is sometimes hard to consistently situate their foundations within the traditional political framework. Though they may ground their theoretical positions very differently, both self-defined liberals and self-defined conservatives appreciate the importance of scientific innovation as a general matter, and understand the complexities of fostering it. Very few questions in patent law offer stark value laden judgment calls evocative of the stark positive or negative reactions that issues like the death penalty evoke.

Circuit splits are always jurisprudentially difficult, because they create strong incentives for forum shopping and undermine precepts of fairness and consistency in the way laws are applied. They were especially problematic in patent cases, when it was possible that identical patent claims could be held valid in some jurisdictions, but deemed invalid in others. The decision to address this by creating a new, subject area-based appellate court was essentially bipartisan. Democrats were in control of the House of Representatives, but Republicans controlled the Senate [FN51] and the Executive Branch when the Federal Circuit Act of 1982 authorized establishment of the Federal Circuit, a unitary, specialized court to hear appeals of patent cases from all of the federal district courts in the nation. [FN52] It was brought to fruition under Republican President Ronald Reagan, even

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though it had been an initiative favored and driven forward by Democratic President Jimmy Carter. [FN53]

***726** The atypical political dynamism of patent law was more recently in evidence in a press release touting the introduction of "Bicameral, Bipartisan Patent Reform Legislation" and noting:

> Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.), and Senator Orrin Hatch (R-Utah), a senior member of the panel, joined with Rep. Howard Berman (D-Calif.), chairman of the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property and Rep. Lamar Smith (R-Texas), ranking member of the House Judiciary Committee, to introduce the Patent Reform Act of 2007. [FN54]

Certainly there are traditional political divides that surface in patent law jurisprudence. In Diamond v. Chakrabarty, mostly "conservative bloc" justices were in the majority (Burger, who wrote the opinion, and Stewart, Blackmun, Rehnquist, and Stevens), while traditionally liberal Brennan dissented furiously over the issue of whether living things should be patentable, and was joined by Marshall, White, and Powell. [FN55] Ironically, the conservative-dominated majority took an expansive and arguably liberal (in at least some senses of the word) view of the Patent Act's definition of patentable subject matter, [FN56] while the (mostly) liberal dissenters argued against reaching an outcome that constituted activist judicial lawmaking in an area of acute public interest. [FN57] Both sides seemed to agree that Congress should step in and show some leadership on a controversial issue that has still not been addressed legislatively at the federal level in any expansive or coherent manner. One way to characterize the fundamental conflict between the majority and dissenting positions is as a disagreement over whether rendering living things patentable or unpatentable was the appropriate default position until Congress acted to clarify its views and intentions. Since that never happened, one can alternatively conclude that the majority got the ultimate issue right (and in consequence Congress hasn't needed to step in), or that the dissenters were correct that allowing the patenting of life through judicial action would defuse pressure on Congress to act, allowing the body to evade its legitimate lawmaking responsibilities in this contentious context.

Recent patent cases demonstrate the apolitical ethos of patent cases at the Supreme Court level. Over the past fifteen years or so the Supreme Court managed to vote unanimously in eight important patent law cases: Cardinal Chemical Co. v. Morton International, Inc., [FN58] Markman v. Westview ***727** Instruments, Inc., [FN59] Warner-Jenkinson Co. v. Hilton Davis Chemical Co., [FN60] Pfaff v. Wells Electronics, Inc., [FN61] Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., [FN62] Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co, [FN63] eBay Inc. v. MercExchange LLC, [FN64] and KSR International Co. v. Teleflex Inc. [FN65] This degree of doctrinal consensus is unusual, and probing the possible policy reasons beneath it is an enjoyable pedagogical exercise.

During the same temporal interval there were also two cases that were close to unanimous that serve to illustrate the unusual politics of patent law. In Medimmune, Inc. v. Genentech, Inc., Justice Scalia wrote a majority opinion that was joined by every Justice except his frequent comrade in many other subject matter contexts, Justice Thomas. [FN66] In Microsoft Corp. v. AT&T Corp., Justice Ginsburg's majority opinion was joined by everyone participating in the decision save Justice Stevens, her regular compatriot in many other doctrinal situations. [FN67] I should point out that during this time period there were also a couple of cases that seemed to fracture along traditional political lines, but in one of them issues other than patent law were deeply implicated: Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank was primarily a case about federalism. [FN68]

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Teaching these Supreme Court cases allows me to spend significant amounts of time outlining and explicating the tensions within the Federal Circuit, and between the Federal Circuit and the Supreme Court, and almost no time debating the effects on patent jurisprudence of traditional political divides. I think this is a refreshing break for the students, and it helps me reach and be an effective teacher to students holding very different political views than I do. Unlike my colleagues who teach courses with highly politicized content, such as Constitutional Law, I am rarely negatively accused of "bias" in my IP classroom teaching evaluations, even though I hold strong views about intellectual property laws and discuss them openly.

***728** C. Trademark Law

Named for Representative Fritz G. Lanham (D-Tex.), the Lanham Act [FN69] was passed on July 5, 1946 and signed into law by Democratic President Harry Truman. Later that year the Republicans regained control of both the U.S. Senate and U.S. House of Representatives, but the Lanham Act took effect in 1947, unimpeded by this shift. In more recent years, trademark holders have been accorded enhanced rights and privileges in a number of ways, such as the institution of the Trademark Law Revision Act of 1988 [FN70] (authorizing intent to use applications [FN71]), the Federal Trademark Dilution Act of 1995, [FN72] and the Anticybersquatting Consumer Protection Act. [FN73] Congressional opposition to these changes has not been particularly fractious, nor was it noticeably divided along party lines. Both political parties seem to have reached a rough consensus that strengthening the powers and privileges of trademark holders is beneficial for the nation. The challenge when teaching this area of the law is to cogently articulate the negative impact that trademark laws can have upon competition, and upon freedom of speech, to convince students that expansive trademark rights can have negative consequences for industry actors, and for consumers as well. The jurisprudence of Justice Scalia is helpful in this regard, as I will describe below.

Trademark jurisprudence is remarkable for the lack of fact-finding and the high degree of intuition that drives court rulings. [FN74] Barton Beebe noted in a recent empirical study of the multifactor tests for trademark infringement that survey evidence is seldom proffered by parties to trademark disputes and rarely credited by judges when it is. [FN75] Trying to figure out what a judge was thinking and unpacking the biases that might have been at play provides an excellent opportunity to talk to students about the effects of bias in the courtroom and techniques that an attorney might use to identify, defuse, or exploit them on behalf of a client. As I noted previously, when describing the inconsistent views in evidence in trademark case law

> Articulated judicial perceptions about particular sorts of consumers demonstrably vary, sometimes dramatically, even within similar factual situations. Wine consumers, for example, are viewed somewhat ***729** schizophrenically by judges. In one case a district court found that "wine drinkers tend to be older, wealthier, and better educated than the average population." However, a different district court in a different case concluded that "the average American consumer is unlearned in the selection of wine." In so doing, it relied on a prior court's opinion, which stated as follows: "[T]he average American who drinks wine on occasion can hardly pass for a connoisseur of wines." This judge distinguished the determination by yet another court that "the wine-buying public--insofar as their selection and purchase of wine is concerned--is a highly discriminating group," with the somewhat snide, startling, and completely unsupported assertion that, "with all due respect to Alabama, it would seem common knowledge that wine was not a widely appreciated beverage in the South in 1959." [FN76]

After pointing out some of the strange asides in trademark cases in which a judge seems to express contempt for the trademarked product, or one of the parties, based on her or his own personal values, rather than any facts of a case, students usually start noticing seeming non sequiturs for themselves. For some of them, this is a

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transcendent moment, in which they get a meaningful understanding of the importance to a client of both critical and creative thinking, beyond simply knowing what a statute says, or being able to reference a string of relevant holdings.

As with copyright law and patent law, reviewing the Supreme Court cases on trademark topics allows me to avoid the pitfalls of traditional partisanship. Teaching trademark law even gives me several opportunities to praise the jurisprudence of Justice Antonin Scalia, something I do not ordinarily find myself doing in other contexts, to put it lightly. Scalia, I can emphatically explain to my students, did a commendable job in his majority opinion in Wal-Mart Stores, Inc. v. Samara Brothers, Inc. [FN77] untangling the disastrous mess that a prior unanimous vote by the Court in Two Pesos, Inc. v. Taco Cabana, Inc. [FN78] had made of certain aspects of trademark law. Two Pesos is, in my view, the worst trademark law opinion ever rendered by the Supreme Court. I say this not merely because I disagree with the outcome, but because I think the outcome reflects fundamental misunderstandings of trademark law. Although I am hardly a "free marketeer," allowing a company to assert broadly construed trade dress protections in restaurant decor that are easily enforceable ***730** via injunctive relief [FN79] without bestowing any concurrent obligation to identify what aspects of the decor it claimed as proprietary strikes me as egregiously unfair and detrimental to legitimate competition. For reasons I will never understand, the Court was unanimously persuaded otherwise. After lower courts began to make the folly of the Court's analysis in the case apparent, [FN80] a unanimous Court clarified important aspects of trade dress doctrine and vastly undercut the reach of Two Pesos in Samara Brothers. While it was rather alarming that not a single Justice objected to White's abominable Two Pesos reasoning, it was quite heartening to see the entire Court recognize and mostly fix the problem together, as well. While I praise Scalia for his Samara Brothers opinion, I am quite critical in my teaching of O'Connor's opinion in Park 'n Fly, Inc. v. Dollar Park and Fly. [FN81] Decided before Scalia joined the Court, only one Justice, Stevens, found it objectionably problematic to interpret a badly drafted provision of the Lanham Act such that high levels of trademark protection were accorded to a phrase that probably never should ***731** have qualified for trademark registration in the first place. While O'Connor's opinion takes the arguably principled position that Congress rather than the Court should fix the doctrinal quandary around "incontenstable" descriptive marks that do not have secondary meaning, it's strange and a bit jarring to note that Brennan and Marshall signed on to this rather stark example of jurisprudential conservatism. Only Stevens expressed the view that the Court ought to step in and facilitate what Congress obviously meant to accomplish with incontestability, rather than fixate on what it obtusely and irrationally said in the Lanham Act.

III. Conclusion: "Follow the Money" as Pedagogical Imperative

Does intellectual property legislation offer more opportunities for bipartisan cooperation than other areas of law and policy? I'm not sure how one might credibly attempt to measure this, but certainly political party based polarization is less visible than it is in other congressional contexts. Industries and interested parties are generally instrumentally invested in the barrier heights of specific categories of intellectual property protections. Pointing this out to students gives them a vivid and important understanding of the legislative process. It also provides an interesting and possibly unique view of the judicial decision making process and of statutory interpretation.

An alternative way to describe the overarching apolitical politics of intellectual property law is with the aphorism "follow the money." There are many ways to demonstrate this in each intellectual property category. For example, in copyright law one can pose queries such as: why did the Recording Industry Association of America oppose peer-to-peer networks by complaining that this kept artists from getting paid, [FN82] while simultaneously trying to get sound recordings added to the categories of works subject to listing the Copyright

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Act's definition for "work made for hire," [FN83] thereby preventing artists from ever exercising termination interests, and in so doing, getting paid? The answer can be ascertained by following the money, both copyright-related revenue and campaign contributions, with a fair amount of ***732** criticism directed at one Democratic congressional representative, and compliments for two others who helped undo the damage. [FN84]

While teaching patent law one can ask questions like: why would the makers of medical devices patent medical procedures, knowing that the patents cannot be enforced against doctors? [FN85] Why would anyone patent something they have no intention of commercially distributing, or purchase patents to inventions that don't appear to have any productive value? Usually, someone has figured out how to use these patents to obtain money in a manner unrelated to exploiting or licensing the claimed invention. [FN86] Hypothesizing about where the money is, and how someone else is attempting to appropriate it for herself, can lead to some fairly sophisticated patent law policy discussions.

And finally, in a trademark law class one might raise questions along the lines of: why would trademark holders ask judges for an injunction to prevent a competitor from using a trademark in ways that is unlikely to cause confusion ***733** among reasonably prudent consumers? Or apply to register marks they have no intention of using to any appreciable degree? Or claim Lanham Act-based protections for product attributes that do not perform source identification functions? Again it is mostly about money, and efforts to prevent competitors from getting any, using any mechanism that trademark law provides.

None of this is meant to suggest that there aren't scores of engaging social justice issues that can be raised whilst teaching intellectual property law. It's simply that in addressing them one usually veers a classroom conversation back into entrenched political divisions, and espousing a personal view can get a professor tagged as a liberal or conservative, if not as a Democrat or Republican. Advocating expansive fair use constructs for public libraries to facilitate making books freely available for people who cannot afford their own sounds like a liberal idea, as does suggesting that developing countries be permitted, without sanction, to ignore the patents on pharmaceutical products so that they can manufacture affordable lifesaving drugs for their own citizens, and that social critics should be able to use a company's trademarks to mock and condemn its objectionable practices. I don't think there is anything wrong with taking an overtly political position in the classroom on occasion, but I do appreciate the many opportunities that teaching intellectual property law presents me to defy partisan grounded expectations when I do so.

[FNa1]. Associate Professor of Law, University of South Carolina School of Law. This Article is dedicated to my students, past, present, and future, and to my son Casey.

[FN1]. See Kate Douglas Torrey, Downloads, Copyright, and the Moral Responsibility of Universities, Chron. Higher Educ., June 15, 2007, at 16; Katie Dean, Copyright Crusaders Hit Schools, Wired, Aug. 13, 2004, http:// www.wired.com/entertainment/music/news/2004/08/64543; Library of Congress, Taking the Mystery Out of Copyright, http:// www.loc.gov/teachers/copyrightmystery/# (last visited Jan. 15, 2008).

[FN2]. But see Matthew Sag, Tonja Jacobi & Maxim Sytch, The Effect of Judicial Ideology in Intellectual Property Cases, available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=997963. This is an interesting paper that makes a number of provocative but sometimes poorly supported assertions about the relationship between ideology and judicial decision-making in the context of intellectual property. To take just a couple of examples: at page nine, the article asserts that "[t]hose in the IP trenches appear to regard judges as either impartial or indifferent on questions of IP." Id. This is supported only by a footnote that merely credits Kenneth Starr, who is

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hardly fairly described as "in the IP trenches," with observing that the Supreme Court is professional and "very lawyerly." Id.

At page twenty, the authors make the startling claim that "in the recent Grokster case, it was fairly clear that all of the justices considered that allowing the providers of file sharing services to blatantly encourage unlawful copying would be an extreme result." Id. I interpret the Breyer concurrence, joined by Stevens and O'Connor, somewhat differently. Certainly Breyer acknowledged the possibility of liability for technology distributors for active advancement of infringement by third parties. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 962-63 (2005) (Breyer, J., concurring). However, this did not, in my view, mean that "the Court held unanimously that the defendants were liable for inducing infringement," as the article's authors assert. Sag et al., supra.

[FN3]. For efficiency purposes I will categorize trademarks as a form of intellectual property for the purposes of this Article, even though I believe that they are more accurately described as intangible commercial property, given that congressional power to regulate trademarks stems from the Commerce Clause of the U.S. Constitution. It is the so-called "Intellectual Property Clause" of the U.S. Const art. I, § 8, cl. 8, that provides the authority for Congress to regulate copyrights and patents.

[FN4]. E.g., Randal C. Picker, Copyright and the DMCA: Market Locks and Technological Contracts, in Antitrust, Patents, and Copyright 180 (Francois Leveque & Howard Shelanski, eds., 2005); Megan Ristau Baca, Barriers to Innovation: Intellectual Property Transaction Costs in Scientific Collaboration, 2006 Duke L. & Tech. Rev. 4 (2006); Eugenia Baroncelli et al., Trademark Protection or Protectionism?, 15 Rev. Int'l Econ. 126 (2007); Daniel R. Cahoy, Patent Fences and Constitutional Fence Posts: Property Barriers to Pharmaceutical Importation, 15 Fordham Intell. Prop. Media & Ent. L.J. 623 (2005); Nicholas S. Economides, The Economics of Trademarks, 78 Trademark Rep. 523 (1988); David Mann, Copyright--Preventing a Safeguard From Becoming a Barrier, Address Before the Conference on the Use of Telematics in the Education of Visually Handicapped People, June 2, 1998, http:// www.snv.jussieu.fr/inova/publi/ntevh/copyright.htm (last visited Jan. 15, 2008); Wanda Noel & Robert Schad, Copyright: Enabler or Barrier to the Educational Use of the Internet, May 2002, http:// info.worldbank.org/etools/docs/library/98771/Policy%20Makers%20workshop/policymakers/docs/pol_mod10_doc1.pdf (last visited Jan. 15, 2008); Nick Smith, Copyright as a Barrier to the Freedom of Access to Information and Freedom of Expression, Address Before the 66th IFLA Council and General Conference, Aug. 15, 2000, http://www.ifla.org/faife/papers/ps00/smith00.htm (last visited Jan. 15, 2008); Peter Suber, Removing the Barriers to Research: An Introduction to Open Access for Librarians, Jan. 21, 2003, http:// www.earlham.edu/~peters/writing/acrl.htm (last visited Jan. 15, 2008).

[FN5]. Presumably students who do not believe in copyright protections at all could be engaged as well, but I have yet to encounter any in my classes. But see Posting of David Pogue to N.Y. Times Technology Blog, The Generational Divide in Copyright Morality, http://pogue.blogs.nytimes.com/2007/12/20/the-generational-divide-in-copyright-morality/ (Dec. 20, 2007, 13:30).

[FN6]. Barbara Mikkelson & David P. Mikkelson, Happy Birthday, We'll Sue, http://www.snopes.com/music/songs/birthday.asp (last visited Jan. 15, 2008).

[FN7]. U.S. Patent No. 6,368,227 (filed Nov. 17, 2000); Jeff Hecht, Boy Takes Swing at US Patents, NewScientist, Apr. 17, 2002, http:// www.newscientist.com/article/dn2178.html (last visited Jan. 15, 2008).

[FN8]. See Symposium, Intellectual Property and Social Justice, 40 U.C. Davis L. Rev. 559 (2007).

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[FN9]. See C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891 (2002).

[FN10]. See Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. Davis L. Rev. 1151, 1164 (2007).

[FN11]. See Jane C. Ginsburg, Copyright Use and Excuse on the Internet, 24 Colum.-VLA J.L. & Arts 1 (2000).

[FN12]. See Ann Bartow, Electrifying Copyright Norms and Making Cyberspace More Like a Book, 48 Vill. L. Rev. 13 (2003).

[FN13]. See, e.g., KSR Int'l Co. v. Teleflex Inc., ___ U.S. ___, 127 S. Ct. 1727 (2007); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 928-29 (2005).

[FN14]. See Ann Bartow, Still Not Behaving Like Gentlemen, 49 U. Kan. L. Rev. 809, 841-42 (2001).

[FN15]. Compare The Democratic Party, The 2004 Democratic National Platform for America: Strong at Home, Respected in the World, at 42 (2004), http:// www.democrats.org/pdfs/2004platform.pdf, with The Republican Party, 2004 Republican Party Platform: A Safer World and a More Hopeful America, at 84 (2004), http://www.gop.com/images/2004platform.pdf.

[FN16]. Sag et al., supra note 2, astutely note, at page 10, "... judicial policy preferences regarding IP do not fit within the stereotypical view of the liberal-conservative ideological continuum."

[FN17]. Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 903 (1987); Peter K. Yu, The Escalating Copyright Wars, 32 Hofstra L. Rev. 907, 908-09 (2004). But see Sara K. Stadler, Incentive and Expectation in Copyright, 58 Hastings L.J. 433 (2007).

[FN18]. NII Copyright Protection Act of 1995: J. Hearing on H.R. 2441 and S. 1284 Before the Subcommittee on Courts and Intellectual Property of the H. Comm. on the Judiciary and the S. Comm. on the Judiciary, 104th Cong. 33-39 (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Comm'r of Patents and Trademarks, Patent and Trademark Office) (1995); see also Jonathan Tasini, Who is Bruce Lehman? Czar of the Information Superhighway Serves Multi-national Media Interests, http://www.nwu.org/nwu/index.php?cmd=showPrinter&page_id=1.2.13.2.15 (last visited Jan. 15, 2008).

[FN19]. See Bruce A. Lehman, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995), available at http://www.uspto.gov/go/com/doc/ipnii/ (last visited Jan. 15, 2008).

[FN20]. See, e.g., James Boyle, A Politics of Intellectual Property: Environmentalism for the Net?, 47 Duke L.J. 87, 105-06 (1997); Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 Yale L.J. 535, 558 (2004); Pamela Samuelson, The Copyright Grab, Wired, Jan. 1996, at 135; Pamela Samuelson, On Authors' Rights in Cyberspace: Questioning the Need for New International Rules on Authors' Rights in Cyberspace, First Monday, 1996, http:// www.firstmonday.org/issues/issue4/samuelson/ (last visited Jan. 15, 2008); Carl Tashian, Copyright in the Digital Age, http://tashian.com/carl/docs/copyright/ (last visited Jan. 15, 2008); see generally Committee on Intellectual Property Rights and the Emerging Information Infrastructure, National Research Council, The Digital Dilemma: Intellectual Property in the Information Age (National Academy Press 1999).

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[FN21]. Jane C. Ginsburg, How Copyright Got a Bad Name For Itself, 26 Colum. J.L. & Arts 61 (2002); Justin Hughes, Of World Music and Sovereign States, Professors and the Formation of Legal Norms, 35 Loy. U. Chi. L.J. 155 (2003); Dante G. Ditommaso et al., The National Information Infrastructure and Copyright Law: The White Paper, Pamela Samuelson, and Proposed Revisions (Apr. 25, 1996), http://www-personal.umich.edu/~dditomm/cr_final_project.html (last visited Jan. 15, 2008).

[FN22]. Michael A. Coletti, First Amendment Implications of Rock Lyric Censorship, 14 Pepp. L. Rev. 421, 422-23 (1987); Gary James, Gary James' Interview with Tipper Gore, http:// www.classicbands.com/TipperGoreInterview.html (last visited Jan. 15, 2008). The PMRC's lobbying convinced nineteen record companies to agree to put "Parental Guidance: Explicit Lyrics" labels on albums to warn of explicit lyrical content. See Coletti, supra, at 424 & n.9; Record Labeling: Hearing on Contents of Music and the Lyrics of Records Before the S. Comm. on Commerce, Science, and Transportation, 99th Cong. 12-13 (1985).

[FN23]. David J. Firestein, The Honky Tonk Gap: Country Music, Red State Identity, and the Election of 2004, Jan. 6, 2005, http:// www.utexas.edu/lbj/webcasts/docs/honkytonkgap.pdf (last visited Jan. 15, 2008); Victims of a Republican Plot: The Dixie Chicks Cross the Road, Counterpunch, May 17, 2003, http://www.counterpunch.org/dixie05172003.html (last visited Jan. 15, 2008).

[FN24]. U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, http:// judiciary.house.gov/committeestructure.aspx?committee=3 (last visited Jan. 15, 2008).

[FN25]. Congressman Howard Berman: About Howard, http:// www.house.gov/berman/about/index.shtml (last visited Jan. 15, 2008).

[FN26]. U.S. Congressman Howard Coble: Biography, http:// coble.house.gov/biography/ (last visited Jan. 15, 2008).

[FN27]. Democrats Win Control of Congress, PBS.org, Nov. 8, 2006, http:// www.pbs.org/newshour/updates/politics/july-dec06/dem-house_11-07.html (last visited Jan. 15, 2008).

[FN28]. H.R. 5211, 107th Cong. (2002).

[FN29]. Press Release, Berman Introduces Legislation to Foil Peer to Peer Piracy (July 25, 2002), available at http:// www.politechbot.com/docs/berman.coble.p2p.statement.072502.html (last visited Jan. 15, 2008).

[FN30]. Declan McCullagh, Lawmakers: Keep Your Tunes to Yourself, c--net News.com, Aug. 16, 2002, http://www.news.com/2100-1023-943134.html (last visited Jan. 15, 2008); Hal Plotkin, Berman-Coble Goes Too Far, SFGate.com, Sep. 12, 2002, http://www.sfgate.com/cgi-bin/article.cgi?file=/ gate/ archive/2002/09/12/p2pleg.DTL (last visited Jan. 15, 2008); Posting of Ed Cone to EdCone.com, http://radio.weblogs.com/0107946/2002/09/27.html (Sept. 27, 2007, 4:59:41PM).

[FN31]. Posting of William Patry to the Patry Copyright Blog, http:// william-patry.blogspot.com/2007/06/larry-lessig-corruption-and-corruption.html (June 21, 2007, 5:35 AM).

[FN32]. See generally Democratic National Convention Committee, Strong at Home, Respected in the World: The 2004 Democratic National Platform for America (2004), available at http://www.democrats.org/pdfs/2004platform.pdf (last visited Jan. 15, 2008).

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[FN33]. Litman, supra note 17, at 903.

[FN34]. See Eldred v. Ashcroft, 537 U.S. 186 (2003).

[FN35]. Id. at 222-43 (Stephens, J., dissenting), 243-69 (Breyer, J., dissenting).

[FN36]. Jeffrey Rosen, The Dissenter, N.Y. Times Mag., Sept. 23, 2007 at 50, 52.

[FN37]. E.g., Gonzales v. Carhart, ___ U.S. ___, 127 S. Ct. 1610 (2007).

[FN38]. E.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

[FN39]. E.g., Atkins v. Virginia, 536 U.S. 304 (2002); see also Justice: 'Serious Flaws' in Death Penalty, CNN.com, Aug. 7, 2005, http:// www.cnn.com/2005/LAW/08/07/death.penalty/index.html (last visited Jan. 15, 2008).

[FN40]. E.g., Posting of Ann Bartow to Comment is free ..., The Wrong Choice, http://commentisfree.guardian.co.uk/ann_bartow/ (April 19, 2007, 7:00 PM).

[FN41]. 471 U.S. 539 (1985).

[FN42]. Id. at 579.

[FN43]. Id. at 605.

[FN44]. See id. at 579-605 (Brennan, J., dissenting).

[FN45]. See, e.g., Janet L. Blasecki, Justice Lewis F. Powell: Swing Voter or Staunch Conservative? 52 J. Pol. 530, 537, 538 (1990); C. Jeddy LeVar, The Nixon Court: A Study of Leadership, 30 W. Pol. Q. 484, 487 (1977); Laughlin McDonald, Uneasy Victories in the Supreme Court, 8 S. Changes 15, 16-17 (1986); Linda Greenhouse, Supreme Court Term: Divisions Over Rights, N.Y. Times, July 9, 1982 at A1, D14 ("The Justices who formed the most indissoluble bloc were the Court's two most liberal members, Associate Justices William J. Brennan Jr. and Thurgood Marshall. They voted alike in 132 cases out of the 141 in which both participated.").

[FN46]. The only reason Brennan was chosen before Marshall was in deference to the fact that Marshall himself honored Justice William J. Brennan by naming one of his sons John William Marshall. Juan Williams, Marshall's Law, Wash. Post Mag., Jan. 7, 1989, at 11, 15. "William" is a very common name, and therefore not particularly distinctive, unlike Thurgood which is uncommon enough that it might lead to childhood teasing, but possibly less so than Marshall's original first name, which was Thoroughgood. Id. at 15.

[FN47]. 464 U.S. 417 (1984).

[FN48]. See id.; Ann Bartow, Electrifying Copyright Norms and Making Cyberspace More Like a Book, 48 Vill. L. Rev. 101, 113-16 (2003).

[FN49]. Sony, 464 U.S. at 457-500 (Blackmun, J., dissenting).

[FN50]. 490 U.S. 730 (1989).

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[FN51]. Bruce I. Oppenheimer, Split Party Control of Congress, 1981-86: Exploring Electoral and Apportionment Explanations, 33 Am. J. Pol. Sci. 653, 653 (1989).

[FN52]. Pub. L. No. 97-164, 96 Stat. 25 (jurisdictional provision codified at 28 U.S.C. § 1295 (2000)).

[FN53]. Federal Judicial History: Federal Circuit Act of 1982, http://www.fjc.gov/history/home.nsf/page/22a_bdy (last visited Jan. 15, 2008).

[FN54]. Press Release, Senator Patrick Leahy, Leahy, Hatch, Berman, and Smith Introduce Bicameral, Bipartisan Patent Reform Legislation (Apr. 18, 2007), available at http://leahy.senate.gov/press/200704/041807a.html (last visited Jan. 15, 2008).

[FN55]. See 447 U.S. 303 (1980).

[FN56]. See id. at 307-18.

[FN57]. See id. at 318-21 (Brennan, J., dissenting).

[FN58]. 508 U.S. 83 (1993).

[FN59]. 517 U.S. 370 (1996).

[FN60]. 520 U.S. 17 (1997).

[FN61]. 525 U.S. 55 (1998).

[FN62]. 535 U.S. 826 (2002).

[FN63]. 535 U.S. 722 (2002).

[FN64]. 547 U.S. 388 (2006).

[FN65]. 127 S. Ct. 1727 (2007).

[FN66]. See 127 S. Ct. 764 (2007).

[FN67]. See 127 S. Ct. 1746 (2007). Chief Justice Roberts did not participate in this decision. Id. at 1750.

[FN68]. See 237 U.S. 627 (1999).

[FN69]. Trademark Act of 1946, Pub. L. No. 79-489, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051-1127 (2000)).

[FN70]. Pub. L. No. 100-667, 102 Stat. 3935 (codified as amended at 15 U.S.C. §§ 1051-1127 (2000)).

[FN71]. See 15 U.S.C. § 1051(b) (2000).

[FN72]. Pub. L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. §§ 1125(c), 1127 (2000)).

[FN73]. Pub. L. No. 106-113, 113 Stat. 1536, 1051A-545 (codified at 15 U.S.C. § 1125(d)).

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[FN74]. See, e.g., Ann Bartow, Likelihood of Confusion, 41 San Diego L. Rev. 721 (2004).

[FN75]. Barton Beebe, An Empirical Study of the Multifactor Tests for Trademark Infringement, 94 Cal. L. Rev. 1581, 1641-42 (2006).

[FN76]. Bartow, supra note 74, at 773.

[FN77]. 529 U.S. 205, 215 (2000).

[FN78]. 505 U.S. 763 (1992). Justice White delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter joined. Id. at 764. Justice Scalia filed a concurring opinion. Id. at 776. Justice Stevens and Justice Thomas each filed opinions concurring in the judgment. Id. at 776, 785.

[FN79]. See generally Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (asserting ease with which injunctive relief can often be obtained in intellectual property cases).

[FN80]. See, e.g., Duraco Prods., Inc. v. Joy Plastic Enterprises, Ltd., 40 F.3d 1431, 1439-40 (3d Cir. 1994):

> ... [T]he Supreme Court in Two Pesos used "distinctive" in a dual sense, meaning either inherently distinctive or having acquired distinctiveness through secondary meaning. Because the Supreme Court in Two Pesos did not decide the question whether trade dress, and in particular trade dress in a product configuration, can actually ever be considered inherently distinctive-- for purposes of that case, the Court assumed that the restaurant decor at issue was so--we must first embark on a journey to delineate when, if ever, product configurations should be deemed inherently distinctive.
>
> Id. (citations omitted).

See also Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1007 (2d Cir. 1995):

> Prior to the Supreme Court's decision in Two Pesos ... this circuit had held that trade dress, unlike trademarks, could never be inherently distinctive, and thus we required plaintiffs seeking § 43(a) protection of trade dress to establish distinctiveness by proving that the trade dress had acquired secondary meaning.... In Two Pesos, however, the Supreme Court rejected this circuit's approach, finding no "textual basis in § 43(a) for treating inherently distinctive verbal or symbolic trademarks differently from inherently distinctive trade dress." .... Plaintiffs in trade dress infringement cases, just as in trademark cases, should be given a chance, the Court reasoned, to demonstrate that their trade dress is "capable of identifying products or services as coming from a specific source." .... To deny such plaintiffs this opportunity until secondary meaning has been established would impose "particular burdens on the start-up of small companies," by allowing competitors to appropriate the plaintiff's dress in other markets and to deter the plaintiff from expanding into and competing in these areas....
>
> The Two Pesos decision left this circuit with the task of determining what it means for trade dress to be "inherently distinctive."
>
> Id. (citations omitted).

[FN81]. 469 U.S. 189 (1985).

[FN82]. Gil Kaufman, RIAA Hits Seven Peer-to-Peer Services with Cease-and-Desist Letters, MTV, Sept. 16, 2005, http:// www.mtv.com/news/articles/1509720/20050916/index.jhtml?headlines=true (last visited Jan. 15, 2008); Piracy: Online and on the Street, http:// www.riaa.com/physicalpiracy.php ("It's commonly known as pir-

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acy, but it's a too benign term that doesn't even begin to adequately describe the toll that music theft takes on the many artists, songwriters, musicians, record label employees and others whose hard work and great talent make music possible.") (last visited Jan. 15, 2008).

[FN83]. Eric Boehlert, Four Little Words, Salon.com, Aug. 28, 2000, http://archive.salon.com/ent/music/feature/2000/08/28/work_for_hire/index.html (last visited Jan. 15, 2008); Brad King, Rule Reversal: Blame it on RIAA, Wired, Aug. 10, 2000, http://www.wired.com/politics/law/news/2000/08/38129 (last visited Jan. 15, 2008).

[FN84]. Boehlert, supra note 83.

> A key figure in the contributions part of the story is Rep. Howard Berman, D-Calif., the ranking Democrat on the Subcommittee on Courts and Intellectual Property and a longtime friend of the recording industry. Billboard reported that Berman took in five times as much PAC and individual contributions from the entertainment industry as any other member of Congress.
>
> Among those who have written personal, $1,000 checks to Berman recently are Time Warner lobbyist Timothy Boggs, Universal's Morris, Seagram CEO Edgar Bronfman Jr., Vicki Iovine, the wife of Interscope Records chief Jimmy Iovine, Universal Music tech guru Lawrence Kenswil and Universal Music Group COO Zach Horowitz.
>
> The RIAA's Rosen was another contributor.
>
> Meanwhile, for the 2000 fundraising season, Berman remains the largest recipient of music industry PAC money from the RIAA ($3,000), Time Warner ($7,000) and Seagram ($3,000).
>
> As it turns out, Berman's staff was among just two or three that knew about, and quietly approved, the work-for-hire amendment last November. "Berman brought it in under his hat," charges attorney [Jay] Rosenthal. Berman declined to comment for this story.
>
> According to Hill sources, when the initial controversy arose Berman privately defended the amendment and told artists they were not going to get it repealed. But then some of Berman's Democratic colleagues, including Boucher and Rep. John Conyers, D-Mich., made it clear that if a repeal was not worked out they would introduce legislation of their own to make it happen. "The train was leaving the station so he decided to get out front," says one observer.
>
> Id.

[FN85]. See 35 U.S.C. § 287(c) (2000).

[FN86]. See, e.g., Ann Bartow, Separating Marketing Innovation From Actual Invention: A Proposal for a New, Improved, Lighter, and Better-Tasting Form of Patent Protection, 4 J. Small & Emerging Bus. L. 1, 2 (2000); Amy L. Landers, Liquid Patents, 84 Denv. U. L. Rev. 199, 201 (2006); Gerard N. Magliocca, Blackberries and Barnyards: Patent Trolls and the Perils of Innovation, 82 Notre Dame L. Rev. 1809 (2007); Mark A. Lemley, Are Universities Patent Trolls? (Stanford Public Law Working Paper No. 980776, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980776 (last visited Jan. 15, 2008).

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