CURRICULA, TEACHING METHODS AND TEACHING MATERIALS FOR COURSES IN INTELLECTUAL PROPERTY LAW AT INSTITUTIONS OF HIGHER LEARNING

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This paper will identify and address three points about the curricula, teaching methods and teaching materials employed in intellectual property law courses offered by institutions of higher learning in the United States. The purpose of these remarks is not so much to describe the status of intellectual property law teaching and research in the United States as it is to identify and stimulate thought and discussion of what I believe to be fundamental issues concerning the objective of legal education generally and intellectual property law teaching and research specifically.

The first point I wish to discuss is the place of intellectual property law in the law school curriculum and the objective of legal education generally. On this point a widespread consensus appears to exist among legal educators in the United States. The second and third points I wish to discuss are more specific to the teaching of intellectual property law and are matters on which there are substantial differences of opinion among teachers of intellectual property law in the United States.

The first point--on which, as I have said, there appears to be widespread agreement--is that the primary objective of legal education, paradoxical as it may sound, is not to teach law. Rather, it is to help students to develop the basic skills necessary to identify and solve legal problems. Providing knowledge of the law may be necessary, but it is not sufficient, in and of itself, to ensure that students will develop those skills. The principal curricular question is thus not what law should be taught but what skills should be developed and how. Consensus on the answer to that question has shaped not only law school curricula generally but also the teaching methods and materials used in virtually all law courses offered in institutions of higher learning in the United States, including courses in intellectual property law.

In part, the consensus on the primary objective of legal education in the United States reflects the heavy--indeed, almost exclusive--emphasis in US law schools on providing professional post-graduate training for students intending to go into the practice of law. I am fond of saying, only half jokingly, that there are no law schools in the United States--only lawyer schools. However, the consensus also reflects a widely shared view as to the nature of law and the process by which it is applied in specific cases. That view (which I share) is that, as much as one might wish it otherwise, it is as a practical matter virtually impossible to formulate usable rules of law that are general enough to apply to a wide variety of individual cases and at the same time specific enough to dictate obviously proper and consistent results in each and every individual case. Human conduct being as infinitely variable as it is, there will always be an element of uncertainty, and thus room for disagreement, over what rule of law is to be applied and how in a particular case and whether a given result in that case is simultaneously consistent with the results reached in previous cases and with the public policies that the relevant rule of law is designed to promote, and is not inconsistent with

other public policies that the legal system also seeks to promote. Given that inevitable uncertainty, merely to teach students specific rules or even broad principles of law will inadequately prepare them, whatever their purpose in studying law may be, to understand and deal with the problems that inevitably arise when rules and principles of law are applied to particular cases, and may only serve to foster the illusion that the application of the law to specific cases does not pose any serious--or, in any event, any academically respectable--problems. In order to play any meaningful role in the operation of a legal system, law schools must teach students to identify legal issues that inevitably arise in the application of legal rules and principles to particular cases and to articulate reasons for why one resolution of those issues is to be preferred over another.

To that end, law schools in the United States widely employ the "case method" of classroom teaching and utilize "casebooks" as the principal text. Casebooks consist largely of edited versions of actual cases--usually appellate court opinions but occasionally the written findings of fact and conclusions of law of a trial court or administrative agency. Where applicable, a statutory appendix or supplement is also employed. The case method of teaching, in turn, consists of the teacher first asking students to identify the legal issue or question in a given case, the "holding" or answer that the court or administrative agency gives to the question, the legal rule or principle on which the holding or answer is based, and the rationale, if any, that the court or administrative agency gives for its answer, and then asking the student to compare that case with others in the casebook and distinguish, reconcile, defend or criticise the result reached in the case being studied. In this way, the student learns not only the relevant rule or principle of law but also the way that it is applied (or misapplied) in specific cases.

Beyond the first year of law school, however, the case method seems to lose its effectiveness, unless supplemented by other teaching methods. The case method, after all, is or should be simply the first step in a much broader, three step educational process that I call the problem method of law teaching. Students best begin the process of learning how to identify and solve legal problems by studying and criticising the way courts and administrative agencies have dealt with such problems in the past. The second, equally important step, however, is that students themselves then be given an opportunity to suggest and defend solutions of legal problems raised by hypothetical fact situations. Not surprisingly, a growing number of teaching materials used in courses offered in the second and third years of law school include a problem supplement for use in class. The final, and most narrowly professional step in the educational process--which could occur either in the law school itself or in some form of legal apprenticeship--is to provide students intending to practice law professionally, either as private practitioners or government administrators, with some form of clinical or applied skills training that gives students exercize in applying a number of interrelated areas of law in the course of drafting legal instruments and negotiating and litigating hypothetical cases.

The foregoing model of legal education as a whole may also be employed to develop or assess the curriculum, teaching methods and materials to be used in the study of any given area of law, such as the law of intellectual property. What should be taught and how in any given law school course depends in part on where in the overall law school curriculum it is offered. In the United

States, at least, the consensus among legal educators, including teachers of intellectual property law, seems to be that the first year of law school should be composed of certain required courses devoted to more general public and private law subjects, such as constitutional law, criminal law and procedure and the various headings of civil law and procedure concerned with enforcing contractual and property rights generally, and providing compensation for civil wrongs, and that narrower or more complex legal subjects (including intellectual property law) that build on these general courses, should be offered as elective subjects in the second or third year of law school.

Beyond this general point of agreement about the place of intellectual property law in the law school curriculum and the overall objective of legal education, however, teachers of intellectual property law in the United States appear to have substantial differences of opinion on two interrelated and more specific curricular questions. The first question, which divides teachers of intellectual property in the US into "generalists" and "specialists", is whether intellectual property law should be taught as one general course or several specific courses. The second question, which divides the generalists into intellectual property law generalists and trade regulation or unfair trade practices generalists, is whether the general course should be limited to intellectual property law or include a still broader range of trade regulation or unfair trade practices.

Among those law schools in the United States which offer a course covering any form of intellectual property at all, the predominant practice is to offer one general survey course. I strongly suspect the reason for that is due less to any particular educational commitment to that approach than it is to limited faculty resources. Even where faculty resources permit more than one course in intellectual property, however, the question remains whether an introductory survey course is more desirable than two or more specialized courses. And even where only one general course is possible, the question remains how general that course should be.

My own view on these questions will perhaps immediately disqualify me from further participation in a symposium on intellectual property law teaching. With apologies to the World Intellectual Property Organization, which is graciously co-sponsoring my appearance here, I must confess that both the course I teach and the student text I have written to accompany such a course are entitled, not Intellectual Property Law, but the Law of Unfair Trade Practices. In the course and book alike, I deal not only with the law of patents, trade secrets, copyrights, trademarks and tradenames, but also with such unfair trade practices as deceptive advertising, trade disparagement and unfair pricing practices, all of which constitute legal wrongs but not violations of intellectual property rights. Indeed, throughout both course and book my focus is more on wrongs than rights. I take that approach because I believe that one can only understand the precise nature of legal rights--particularly so-called intellectual property rights--by studying in detail what constitutes an infringement of those rights as intellectual property rights serves more to obscure than it does to define the line between infringement and privileged conduct.

Having said all this, let me quickly add that I feel no particular discomfiture with using the term "intellectual property law" as the title for a course, so long as the teacher of such a course constantly forces students

to compare and distinguish property rights and other forms of legal rights and to criticize as well as to defend the characterization of patent, trade secret, copyright and trademark rights as property rights. (This would seem to be a particularly high educational priority in socialist countries, where private property rights in tangible things are themselves more qualified and subject to criticism than they are in countries with a market economy.) Nor do I feel as strongly about the need to extend a general introductory course beyond the law of patents, trade secrets, copyrights, and trademarks as I do about the need for there to be an introductory course in which these bodies of law are compared and distinguished. For, in my view, a properly conducted comparative course would itself reveal that patent, trade secret, copyright, and trademark rights bear widely varying degrees of similarity with property rights in tangible things and only a superficial similarity to each other. At the same time, such a course would reveal a truth that deserves greater recognition in socialist and market economy countries alike--namely, that the creation of private legal rights, including intellectual property rights, must be for the purpose of serving, and, if properly defined and applied in specific cases, will in fact serve, the public good.

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SCOPE AND CONTENT OF COURSES ON INTELLECTUAL PROPERTY LAW; APPROACHES IN CERTAIN COUNTRIES OUTSIDE THE ASIA AND THE PACIFIC REGION

SUMMARY

This document contains summaries of intellectual property law teaching and research originally presented at the Round Tables of University Professors on Teaching and Research in Intellectual Property Law, held in Geneva, in 1979 and 1981. The summaries were prepared by professors at universities or other institutions of higher learning in the following countries: Argentina, Colombia, Egypt, Finland, France, Germany (Federal Republic of), Hungary, Mexico, Peru, Philippines, Poland, Spain, United Kingdom, United States of America.