Journal of Legal Education
December, 2004

The First-Year Curriculum

*504 WHY INTELLECTUAL PROPERTY BELONGS IN THE FIRST-YEAR PROPERTY COURSE

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The purpose of this article is twofold. First, I make the case for teaching intellectual property in the first-year property course. Then, I urge property professors to consider teaching the right of publicity as the IP doctrine of choice in the first-year property curriculum.

Why Teach IP in the First-Year Property Course?

Theoretically speaking, teaching IP facilitates thinking about property law generally in a more integrated way. Indeed, the doctrines and theoretical underpinnings of all types of property law are similar. For example, nearly all of the doctrines of IP as well as tangible property reflect a fundamental tension between the desires of property owners and the desires of other people or entities. Examples of this tension in real property include a landowner's inability to exclude people from her property in certain circumstances, [FN1] the doctrines that define the respective rights of landlords and tenants, and zoning laws that attempt to balance a landowner's interests against those of the government. Similarly, trademark law generally deals with balancing the rights of trademark owners and others who wish to use the same or a similar trademark. A parallel tension inheres in both copyright and patent law, which seek to strike the appropriate balance between protecting authors' and inventors' rights and insuring the optimal access to protected works. [FN2]

Moreover, the legal concept of ownership is quite similar for all types of property: the owner's rights consist of her legal interests in the object in which the property is embodied. This conception of property contrasts markedly with the layperson's definition of property, which focuses on physical ownership of the thing itself. Copyright law provides an apt illustration of the bundle ***505** of rights analysis relevant here: it does not protect one's right to the object in which the copyrighted work is embodied, but instead protects the rights to reproduce, distribute, publicly perform, and display the work, as well as the right to make a work that derives from the original work. [FN3]

Covering some IP also enables an instructor to focus on relevant differences between IP and other property, an exploration that enhances students' ability to understand the rationales for property protection on a global level. There are certain obvious differences, of course, such as the respective statutory and common law bases, as well as the fact that IP enjoys a finite term of protection for the most part (unlike real property). [FN4] From an economic standpoint, tangible property is considered a “private good” because, generally speaking, a possessory interest in tangible property cannot be used by more than one person without each interfering with the other's enjoyment (although note that different people can occupy different interests in the same piece of realty-

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landlord and tenant, easement and fee owners, and concurrent owners of property). In contrast, patents and copyrights can be considered "public goods" in that their possession is nonrivalrous. [FN5] In other words, it is possible for many people to enjoy simultaneously the benefits of an invention or a copyrighted work without interfering with one another. Thus, whereas private ownership of tangible property increases social value, an argument can be made that private ownership of intangible property decreases social value. On the other hand, without IP protections people might not have the incentive to create works and inventions that would ultimately benefit society. Further, although the copyright clause typically is explained in utilitarian terms consistent with the above reasoning, copyrights and patents also can be supported based on a natural rights theory of property. [FN6] Such a justification facilitates additional theoretical comparisons to real property theory.

In addition, an instructor can use the subject matter to introduce statutory material into what is otherwise largely a common law course. For example, when I teach copyright fair use, an area that is statutorily codified [FN7] but largely interpreted by the common law, the students grapple with the statute in some detail as well as its judicial interpretations. Similarly, when I cover trademark infringement, the statute provides even less guidance; students gain experience***506** dealing with an area in which the statute lays the broad groundwork (e.g., infringement exists when there is likelihood of consumer confusion [FN8]) and the courts invoke multifactor tests for determining how this statute should be applied. [FN9] Therefore, by doing at least some IP, students will get a flavor for what it means to work with and interpret statutes, and such exposure can be quite beneficial at this stage of their legal education.

Practically speaking, because IP is related to many conventional areas of property law, it can be easily integrated into a syllabus even if one does not wish to do a separate IP unit. For example, when covering landlord-tenant law, one can discuss several recent cases dealing with landlord-tenant liability for selling counterfeit products. [FN10] IP (specifically trade secrets) has been the subject of takings cases, [FN11] and moral rights protections also can be analyzed from a takings standpoint. [FN12] If one covers zoning, it is possible to incorporate recent cases involving the interface between municipal outdoor signage restrictions and a provision of the Lanham Act prohibiting states and municipalities from requiring the alteration of federally registered marks. [FN13] Recording statutes can be analogized to the trademark registry in that both provide examples of the concept of constructive notice. [FN14] Finally, like other forms of property, IP is capable of being assigned, inherited, and divided as marital property, and recent cases explore these themes as well. [FN15]

As always, suggesting that new material be included in traditional courses raises the question: What would we have to leave out to squeeze this in? I do not believe that inserting IP into first-year Property will necessitate eliminating any subject matter that is critically important to the future of a practicing attorney. In my view, there is no subject matter in first-year Property that is absolutely essential to a student's understanding of the course. Property, perhaps more than any other first-year course, comprises a variety of distinct ***507** subject areas. To put the matter more colorfully, Property frequently offers students tapas rather than a full meal. [FN16]

In 1997 Jerry Organ and I undertook a survey of property teachers as part of our presentation for the AALS property conference held that year in Washington, D.C. [FN17] Through the responses to our formal survey instrument as well as the informal sessions that took place during the conference itself, we learned that there were certain areas of property that virtually all teachers covered. These included adverse possession, estates and future interests, servitudes, and concurrent ownership. The question, however, is whether any of these-or any other-areas are so significant that their elimination would render the first-year property curriculum deficient. One way of approaching this question is to ask whether law students are likely to gain exposure to certain areas in any other course. But even if no other course in the curriculum contains significant coverage of any one area,

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would the absence of exposure to certain material render one at a significant disadvantage in the legal profession?

My answer to this question is that, from a coverage standpoint, it really does not much matter what we teach our students in the first year. I know that bar passage issues abound (at my school and at many others), but in truth the bar preparation courses are good at what they do. Moreover, I very much doubt that most students will remember the fine nuances of running covenants, the classification of future interests, or the rule against perpetuities by the summer after graduation. Perhaps an argument can be made that mastery of complicated subject matter is facilitated by having learned it at a much earlier time. This position, though, is undermined by the fact that law schools typically do not require students to take secured transactions or commercial paper classes or other complicated material that also appears on most state bar exams. So I have never been persuaded that any one particular subject must be covered just because it is on the bar exam.

Of course, IP is vital for students in this day and age. When I started teaching over twenty years ago, IP was still a backwater area of the law. The dean who hired me did not care what else I wanted to teach as long as I agreed to teach property. Now I think it is fair to say that IP permeates most areas of practice: corporate lawyers, litigators, estate planners, and even solo practitioners will need exposure to IP. Personally, I would go so far as to say that IP is the most significant form of property in the twenty-first century. An instructor who teaches at a school that offers numerous IP courses can use the first-year property course to introduce students to some of these basic concepts. Moreover, some elementary coverage of key concepts is especially critical at schools that do not have a significant number of IP courses in the upper-level curriculum.

Finally-but not unimportant-including IP materials in first-year Property will make the course more fun and more relevant to students' lives. One can ***508** resurrect the elementary school concept of show and tell: I've brought in koosh balls, [FN18] Levi's jeans, [FN19] cans of Slim Fast and the Walgreen's generic version, and other assorted paraphernalia to entertain my first-years. And anyone who teaches IP can take on the persona of someone cool: after all, subject matter steeped in music, art, literature, popular culture, and even technology has a certain glitziness lacking in other legal disciplines.

Perhaps more than any other area of property, IP is relevant to students' individual lives. I always tell my IP class that they will never watch television, go to the grocery store, take a road trip, or do anything else in quite the same way after learning about copyrights and trademarks. All students are consumers; all students are users of copyrighted materials; all students are authors. And IP always is featured in the newspapers in one form or another. Students really enjoy learning about subject matter that relates to their personal circumstances. Although there are other areas of property with similar real-life relevance to some or even many students (landlord-tenant and marital property being the most obvious), IP is relevant to everyone.

What IP Topics Could You Include?

Assuming you are now persuaded to integrate more IP into first-year Property, just how will you go about it? Among the leading casebooks there is a significant disparity in coverage of IP. Some contain virtually no IP. Some have a minimal amount-enough to let students know that IP exists. [FN20] And a few have substantial units on IP. [FN21] Our casebook, *Fundamentals of Modern Property Law*, [FN22] in keeping with the problem method we invoke, takes isolated topics within IP and gives them a treatment appropriate for first-year students. We eschew patents and cover concepts within just three key areas: trademarks, copyrights, and publicity rights. There is sufficient material to spend up to three weeks on IP, which is my own choice, but each of the three units

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can be taught in about a week.

So if you are inclined to give a one-week trial to IP, what would be the best way to proceed? My suggestion is to incorporate the right of publicity as a separate unit. The right of publicity allows an individual to safeguard the commercial value of his name and likeness and to prevent others from exploiting them without permission. Although the doctrine has potential to ***509** apply to the persona of any individual, the litigation in this area typically revolves around celebrities. Here are my reasons for covering this area in Property.

Probably most important, the right of publicity links back to the primary question of why we protect private property generally. Studying some of the rationales for protecting the right of publicity as a property right-such as enjoyment of the fruits of one's labors and prevention of unjust enrichment- can give rise to engaging policy discussions examining critical policies underlying protection for private property. One can raise questions such as: What concepts drive considering the right of publicity as property? Whose work ultimately is being protected-the persona or others that have helped shape the persona? Do we lose more than we gain as a society by virtue of such protection? The incorporation of these themes will not only enrich a class discussion of the right of publicity, but also will facilitate a broader understanding of the underpinnings of property theory generally.

Further, the right of publicity is tremendously fun. More important, it connects to an extraordinarily wide range of *other* issues dealt with in first-year courses. Here is a list.

Running covenants. Discussing the right of publicity can enable a teacher to revisit the law of running covenants (thus juxtaposing what is for some the least fun part of the course with the most fun). Consider that coverage of the right of publicity can be intertwined with a discussion of drawing a distinction between legal and equitable relief-a discussion of considerable importance in traditional covenant law. For example, might certain right-of-publicity cases present situations in which a damage remedy is appropriate but not injunctive relief? [FN23]

Estates and future interests. By taking up the issue of whether the right of publicity is descendible (can be passed to one's heirs), [FN24] an instructor can elaborate upon an estate-planning/future-interest focus that often is incorporated into first-year Property.

Marital property. The right of publicity easily can be connected to marital property by examining whether it should be considered marital property subject to dissolution upon a divorce. In our casebook there is a Principal Problem revolving around this issue. By doing this, you can compare the right of publicity to other forms of human capital such as J.D. or M.D. degrees. Students really enjoy these types of discussions. An instructor can also use such a discussion to examine valuation techniques in connection with nontraditional forms of property.

Disability pensions. In the area of disability pensions, one problem that arises is determining which part of the pension is attributable to employment prior to the marriage, and which part to employment after informal separation. Further, should either or both of these parts be distinguished from each other ***510** and from the part attributable to employment during the period the couple was married and living together? These inquires parallel those presented by the issue of at what point specifically during a person's lifetime is her right of publicity acquired.

Other nontraditional property interests. Considering the question of what attributes ought to be protected by the right of publicity also can give rise to a discussion of the protectability of personal information and/or body parts. [FN25]

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Other IP regimes. Because the theoretical basis for protecting the right of publicity also is steeped in avoiding consumer deception, a discussion of the right of publicity can facilitate some introductory observations and comparisons about the operation of trademark law generally. The same is true for copyright law since often right-of-publicity cases involve appropriations of copyrightable works.

Other first-year courses. The right of publicity relates to torts, contracts, and constitutional law. Historically the right of publicity was viewed as a tort according to Prosser's seminal formulation. [FN26] It also has contractual elements since it is capable of being licensed and assigned separately. Moreover, one of the important rationales underlying the doctrine is the prevention of unjust enrichment. [FN27] Finally-and this is a huge issue in publicity rights litigation-the intersection between the right of publicity and the First Amendment can keep your students busy for an entire semester. This last point also can be used to illustrate the right-versus-access theme common throughout a study of property.

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As teachers, we often want to expose our students to the material we find most interesting. I have always regarded the opportunity to teach first-year Property as a tremendous benefit because, by virtue of the course's structure and composition, instructors typically enjoy a degree of latitude that is perhaps not available in any other course in the first-year curriculum. Although my own bias is to use this flexibility to incorporate more IP, other teachers can make strong cases for adopting different important areas of interest such as zoning and environmental law. The decision of what to include, therefore, often can be a difficult one, particularly for junior faculty. That said, I do believe we owe it to ourselves, and to our students, to break free from old patterns and try some new material. So, should you be so inclined, please consider IP. If you try it, I really believe you will like it!

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[FN1]. See, e.g., State v. Shack, 277 A.2d 369 (N.J. 1971).

[FN2]. See Edward Rabin, Roberta Rosenthal Kwall & Jeffrey C. Kwall, Fundamentals of Modern Property Law, 4th ed., 1178 (New York, 2000).

[FN3]. See 17 U.S.C. §106. See also Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir. 2000), for a further discussion of copyright's “bundle of rights.”

[FN4]. Copyright protection generally lasts for the life of the author plus 70 years after death. 17 U.S.C. § 302(a). For most patents filed on January 1, 1995, or later, the term of protection is 20 years from the date the patent application is filed. 35 U.S.C. § 154(b). In contrast, trademark protection lasts as long as the mark is in use, but the registrant must file periodic affidavits averring continuing use. 15 U.S.C. 1058-59.

[FN5]. See Rabin et al., *supra* note 2, at 1180. For a more complete discussion of the nonrivalrous aspects of IP, see C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891, 907 (2002).

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[FN6]. See, e.g., Wendy Gordon, A Property Right in Self-Expression: Equality and the Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. 1533 (1993); Alfred Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517 (1990).

[FN7]. See 17 U.S.C. §107.

[FN8]. See 15 U.S.C. 1114.

[FN9]. See, e.g., Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961) (seminal case in this area).

[FN10]. See, e.g., Adobe Systems Inc. v. Canus Productions, Inc., 173 F. Supp.2d 1044 (C.D. Cal. 2001); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996); Hard Rock Cafe Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143 (7th Cir. 1992).

[FN11]. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002); Pharmaceutical Care Management Assocation v. Rowe, 307 F. Supp.2d 164 (D. Me. 2004). Cf. Zoltek Corp. v. United States, 58 Fed. Cl. 688 (2003).

[FN12]. For a discussion of whether the Visual Artists Rights Act, the federal moral rights legislation governing visual art, effectuates a taking, see Roberta Rosenthal Kwall, How Fine Art Fares Post VARA, 1 Marq. Intell. Prop. L. Rev. 1, 16-29 (1997).

[FN13]. See, e.g., Blockbuster Videos, Inc. v. City of Tempe, 141 F.3d 1295 (9th Cir. 1998); Payless Shoe-Source, Inc. v. Town of Penfield, New York, 934 F. Supp. 540 (W.D.N.Y. 1996). See also Roberta Rosenthal Kwall, Regulating Trademarks on Exterior Signs: Should Local Law Trump the Lanham Act and the Constitution? 71 S. Cal. L. Rev. 1105 (1998), for a full treatment of this issue.

[FN14]. Registration on the Principal Register provides constructive notice that a mark is in use, thereby conferring on its owner the right, after the mark is so registered, to enjoin anyone who adopts the same or a similar mark for similar goods. 15 U.S.C. § 1072.

[FN15]. See, e.g., Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir. 2000).

[FN16]. My thanks to Susan E. Looper-Friedman for providing the initial idea for this description.

[FN17]. Our findings are published in Roberta Kwall & Jerome Organ, The Contemporary Property Law Course: A Study of Syllabi, 47 J. Legal Educ. 205 (1997).

[FN18]. See OddzOn Products, Inc. v. Oman, 16 U.S.P.Q.2d 1225 (D.D.C. 1989).

[FN19]. Jordache Enterprises, Inc. v. Levi Strauss & Co., 841 F. Supp. 506 (S.D.N.Y. 1993).

[FN20]. The most recent edition of Dukeminier & Krier has a 25-page unit entitled “Acquisition by Creation” that treats some IP concepts. Jesse Dukeminier & James E. Krier, Property, 5th ed., 49-77 (New York, 2002). The third edition of Singer has somewhat more complete treatment of the subject, incorporating some trademark, copyright, and right-of-publicity materials. Joseph Singer, Property Law: Rules, Policies, and Practices, 3d ed. (New York, 2002).

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[FN21]. James Smith et al., Property Cases and Materials (New York, 2004) has separate units on the right of publicity and IP generally); A. James Casner et al., Cases and Text on Property, 5th ed. (New York, 2004) has a separate unit covering the right of publicity, copyright, misappropriation, trademark, and patent law).

[FN22]. See *supra* note 2.

[FN23]. See generally Roberta Rosenthal Kwall, The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47 (1994).

[FN24]. Elvis Presley International Memorial Foundation v. Elvis Presley Memorial Foundation, Inc., 733 S.W.2d 89 (Tenn.App. 1987).

[FN25]. Cf. Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991).

[FN26]. William Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960).

[FN27]. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
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