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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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*813 TEACHING AN INTELLECTUAL PROPERTY SEMINAR THROUGH THE LEGAL LITERATURE

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Introduction

The content and application of Intellectual Property (IP) law are becoming increasingly dominated by new and ever more complex technology. The rapid changes and developments occurring with respect to the subject matter of IP are reflected not only in the substance of what we teach but also in our teaching methodologies. Yet, as the famous saying goes, the more things change, the more they stay the same. Despite all the glitz and glamour surrounding IP over the past two decades, the fact remains that IP law, like any other area, is best taught and learned through a careful application of the lost art of reading. Law students of this generation are representative of their peers in other disciplines in that they are far more comfortable with visual learning as opposed to plain old reading. To be sure, law students spend a lot of time reading. In the majority of their courses, however, the reading is geared toward mastery of subject matter on a macro scale. The academic experience of reading a law review article, or even an academic press book, in order to absorb its essence on a micro level typically is not a part of the law school experience. But it should be. The seminar format provides the ideal educational vehicle for exposing students to meticulous readings of law review articles in their entirety.

I have taught seminars exclusively through the legal literature in various formats. My initial foray into this venue in 2003 was a seminar on Moral and Publicity Rights in which I assigned five articles on the right of publicity and five on moral rights. [FN1] Later, due to a generous donation by an alumnus, I ***814** moved to a format in which I hosted about five professors each year who present works in progress on various copyright issues. The students analyze each article in class the week prior to the guest speaker's lecture. The format I am using this year at both DePaul and Tulane relies on the draft of an academic press book I am writing on moral rights as the basic text for the course, [FN2] supplemented by readings of published law review articles on complementary topics such as originality, creativity theory, and the history of the copyright clause, [FN3] as well as works in progress presented by a limited number of guest professors. In most years, I try to include a practitioner during the semester to discuss some interesting litigation in which he or she has participated. This lecture provides the students with a refreshing change of pace and a break from the usual targeted academic focus.

Although the exact contours of each seminar I have taught in this manner have differed, they all share the goal of requiring students to read thoughtfully works of secondary literature in their entirety rather than excerpted versions. To get a feel for how popular the legal literature seminar format is among our colleagues, I have spoken informally with IP professors and also posted an inquiry on the IP Profs Listserv asking colleagues who do similar types of seminars to contact me. Based on these informal inquiries, it appears as though at least nine other professors use somewhat similar models, although I strongly suspect there are many more. [FN4] I will discuss further the specific ***815** mechanics of my own courses in Part II, but initially I explore why the legal lit-

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erature approach to IP seminars is valuable.

I. The Merits of the Legal Literature Approach

There are numerous reasons why I like the idea of teaching an IP seminar though the legal literature. As suggested earlier, one important factor is that there really is no other place in the law school curriculum in which students have an opportunity to read a law review article in depth just for the sake of reading the article. Specifically, although students may read parts of law review articles for various legal writing assignments, or even as part of assignments for other courses, in these instances the reading is usually geared toward the objective of learning the material in order to accomplish the specific task of writing a memorandum or performing well on an exam. In the seminar format, however, students have a luxury they do not enjoy elsewhere in law school--the ability to read an article just for the sake of learning and enjoying the material without any other end in mind. In this way, the legal literature seminar affords students a novel and, according to many of my students, much appreciated opportunity.

A related benefit is that teaching a seminar through the legal literature allows students to examine a particular area through a multi-dimensional perspective. In selecting articles for inclusion in a given course, I always try to approach a designated topic from a variety of perspectives so that students can receive firsthand exposure to the internal dynamics of academic discourse. Although it is true that most students will not be entering the legal academy, legal literature seminars also potentially stimulate in law students an appreciation for the importance of reading law review articles in practice. In addition, a course emphasizing the legal literature provides a nice counterpoint to upper level courses which are more skills-oriented. While in law school, students should experience a blend of the "academic" and the "practical" in their elective choices.

Many seminars, although perhaps not all, require students to produce their own works of scholarship. [FN5] With respect to student writing, the benefits of a course that focuses on legal literature are manifest. In order to maximize the success of their own writing agendas, students need to be careful readers of other articles. As Peter Jaszi and Martha Woodmansee have noted, "[w]e inevitably draw on the works of others in our creative activities." [FN6] Good writers tend to be good readers. In fact, many IP scholars have lamented the ***816** expansive nature of copyright protection on the ground that greater public access to works is necessary in order to stimulate additional creative enterprise. [FN7] Students who read works of legal literature in a seminar format under the guidance of a professor have the opportunity to focus on a given article with respect to both its substance and its structure. In this venue, they can pay attention to organizational structure, word choices, the flow of particular arguments, and originality in presentation. By virtue of this class structure, students are able to develop the skills of evaluating and critiquing legal arguments in a context other than the more familiar case method. This diversity in analytical experience should enrich and deepen their lawyering skills.

Professors also gain unique benefits from teaching legal literature seminars. Notwithstanding tenure reviews and agreements to provide colleagues with commentary on their works, all too often we read articles only to facilitate our own focused scholarly agendas. As a result, we may not always invest the time necessary to contemplate, analyze, and digest others' works of scholarship, particularly those works that are not of direct relevance to our individual academic pursuits. When preparing for a class in which the entire assignment consists of a designated law review article, instructors may approach the reading with a completely different mindset than when reading for their personal research agendas. Like our students, we can benefit from a more critical contemplation about the nature of an assigned article in its entirety, from both a substantive and structural standpoint. Moreover, it is fun, and often instructive, for professors to see a given article through their students' perspectives. There have been many times in the past when my view of a particular article has been influenced by my

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students' reactions and commentary.

Another set of benefits is institutional. If you are able either to raise some money or persuade your dean to allocate a relatively small stipend, you can invite outside speakers to presents works in progress and thus turn your seminar into a facet of your school's IP program. The required sum of money does not have to be large, and if your school is located in a geographic area with many other law schools, you can also rely on local professors to keep the costs down. [FN8] Not only do students enjoy putting faces with the names of professor authors, but often the guest visitors will be impressed with your students as a result of the intellectual dialogue. In short, this type of format is a very easy way to raise your school's IP profile at a relatively modest cost.

***817** II. The Mechanics of the Legal Literature Approach

The relevant mechanics of any seminar will depend largely on the specific requirements of a given law school. Based on the informal survey I conducted on the IP Profs Listserv, [FN9] professors use a variety of grading mechanisms in their seminars, but the law review style research paper appears to be the most typical model based on my limited information. [FN10] With one exception discussed below, I have always required that students produce a law review article. [FN11] I find this format offers tremendous advantages for the students despite the fact that many of them will never be called upon to produce a similar work in the future. Requiring students to write a law review article opens the door to publication opportunities for a wider range of students than those on law review. Over the years, many of my students and former students have published their student seminar papers as law review articles after they graduate, and I strongly encourage them to do so both during the course of the class and afterward. That aside, the experience of writing a law review article is invaluable and relatively unique in the law school curriculum.

One year, rather than requiring students to write a law review article on a topic of their choice, I asked them to write an "Article Review" of one of the articles assigned in class. The final product was intended to be somewhat similar to a law journal's book review rather than a more open-ended law review article. I expected students to go beyond a critique of the article they selected and present their own analysis of the topic. The benefit of this approach is that students can be a bit more focused in their writing and research. The downside is that they have a more limited ability to select a topic and pursue their own research agenda. Moreover, there are no publication opportunities for students after they complete their papers. If I were to offer this opportunity in the future, I think I would do so as an option available to students in addition to the conventional law review format.

One of the reasons I decided to try the "Article Review" format is that some students have a hard time selecting a topic. There are usually a few students every year who have an especially difficult time deciding upon a topic despite the fact that I always e-mail them several weeks prior to the commencement of the seminar, asking them to begin thinking about topic selection and specifying the date by which the topics must be chosen. In addition, I always have my students read Eugene Volokh's terrific article, ***818** Writing a Student Article, which provides extremely useful advice not only on topic selection but also on the entire writing process. [FN12]

One specific mechanical issue that will arise if you adopt the legal literature format is deciding how much, if any, of your own work to assign. I imagine a professor's approach to this question will depend on whether the particular topic of the seminar is one in which she has done a considerable amount of writing. When I teach seminars based on moral or publicity rights, I do assign my own work. Nevertheless, I always include works by others representing viewpoints contrary to my own so that my students gain a global perspective on the subject matter. In contrast, when I teach a seminar examining a variety of topics within IP generally or copyright specifically, I do not typically assign any of my own work. If, however, the seminar is more focused on works in

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progress rather than published articles, sometimes I choose to present some of my current research. In these instances, I usually do not assign any reading in advance and try to schedule this session during the noon hour so that I can supply a pizza lunch and other munchies. In other words, I treat my presentation as a bit of a break for the students with respect to the work load for the course, and typically, I schedule the session at the very end of the semester when they are otherwise very focused on completing their papers.

In teaching any law school seminar, there are always certain pedagogical questions to consider. These include whether to require outlines and first drafts; whether to give students release weeks in order to work on their papers without class demands; how to deal with the extensions; determination of the grading criteria; when and how to schedule student conferences; whether to require assignments beyond the research paper; whether to mandate student presentations; and how to deal with a student whose writing ability is far below the norm. I do not claim to have any special expertise with respect to any of these issues, but I have taught seminars since I began my teaching career nearly twenty-five years ago, [FN13] so I will conclude this section with a few observations on these matters.

Historically, I have required an outline and bibliography three to four weeks into the semester, and a first draft (with a more complete bibliography) after eight to nine weeks. I meet with each student after I have had a chance to ***819** review these assignments. In general, I have found that the better the first draft, the better the final product (a not too surprising result, I imagine). Some students have the tendency to slack off with respect to these assignments, so in recent years, I started basing a small percentage of their grade on these assignments (typically, 5% for the outline and 15-20% for the first draft). I must confess that over the years, I have lowered my expectations for the first draft to comport with the reality of what I often receive. If I had my way, student seminars would last a full year rather than a semester, because I think it is unrealistic to expect students to produce a law review article of publishable quality in just fourteen weeks (despite the fact that some students do). I now use the first draft as a mechanism to assess students' abilities to write, research, and organize (rather than as a mechanism for assessing the paper on a more global level). Thus, I emphasize that their focus with respect to the first draft should be on thoroughly writing and researching the first substantive section of the paper as well as their global organization. I do tell students that ideally, their first drafts should incorporate as much of their research and writing of the entire paper as possible, but at a minimum I require a detailed outline of everything beyond the first substantive section. [FN14]

In addition to the final paper, I have students write short (two- to three-page) reflection papers on the articles we have discussed in class. The point of this exercise is to encourage students to reflect and comment upon narrow aspects of the papers under discussion. The reflection papers also afford students an opportunity to factor additional assignments into their final grade calculus. The first time I taught a legal literature seminar I had the students do ten reflection papers which together represented a total of 20% of their final grade. In retrospect, I think this was too much, so over the years, I have reduced the number of reflection papers and the relative percentage they count toward the final grade. Currently, I am requiring just one three-page (single-spaced) reflection paper which accounts for 10% of the grade.

In some years, I assign a student (or groups of students) primary responsibility for running a particular class. Also, in the past I have occasionally mandated as part of the course requirements a critique of one of their classmate's papers. At the moment, I lean towards reducing the overall number of requirements aside from those in connection with the final paper, but I would not rule out resuming either of these practices in the future.

Similarly, in recent years, I have eliminated the student presentation requirement (although, as discussed

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above, I have substituted the reflection papers as a supplement to final paper). As of this writing, however, I am teaching a seminar at Tulane where student presentations are the norm and so I ***820** have reinstated them. Initially, I abandoned the presentation requirement because there never seemed to be enough time for each student to have a meaningful amount of time to present their work to the class and the atmosphere always felt rushed. In addition, with a class of nearly twenty students, the student presentations would swallow up at least five classes which limited the other materials we could cover in a fourteen-week semester. This is particularly true if you allow your students one or more "release" weeks, which I almost always do (although I often schedule one release week during the week we have conferences on the first drafts). Candidly, I remain conflicted on the wisdom of eliminating student presentations because I do believe they are beneficial to both the presenter and the entire class, and I look forward to reassessing my perspective following my experience with student presentations at Tulane.

I typically have the final paper count for at least 60% of the grade, although currently I have raised the percentage to 65%. I break down the relevant grading categories as follows: 20% for research and familiarity of the legal literature and cases; 25% for writing (including organization, clarity, and expression); and 20% for originality and development of ideas. There is no magic to this particular formulation, and as one might expect, the lines between these categories often blur when it comes time to grade. I have found, however, that just as there is always an inherent range with respect to my exam grades, the same is true for seminar papers. At DePaul, we do not have a mandated curve for seminar courses, and therefore the grades tend to be higher overall than for exam courses. Most of the students receive As and Bs, but there are always a few Cs, and even an occasional D.

In some years, I have had students who have greatly struggled with the writing process. Fortunately, this has not occurred often, but it has happened. I will usually confer with our Legal Writing Director if, after more than a couple of heavy line edits and explanatory conferences, I feel a student needs help beyond what I can provide. There are some writing resources sponsored by our university that sometimes have been helpful in these circumstances. Over the years, I also have had a few instances in which a student was making progress, but at a pace much slower than the rest of the class. If the student is trying hard throughout the semester, I will encourage him or her to take an incomplete and allow more time for the completion of the paper. Regarding the issue of extensions on a more general level, I tend to be strict with respect to the outlines and first drafts, but liberal in terms of the final papers. Barring extenuating circumstances, I do not allow extensions for the outlines and first drafts, as these are intended as checkpoints for the overall writing process. I will deduct points from the final grade if these assignments are turned in late. In contrast, for the final papers, I usually select a due date the week after classes end as a baseline, but allow students to vary their individual completion times according to their respective circumstances.

***821** Conclusion

In some respects, teaching a seminar class is more challenging for a professor than a conventional class. Although seminars may afford more flexibility during the majority of the semester, they entail an extremely high work load during peak times. Moreover, in my experience, grading seminar papers, while more interesting than grading exams, is also more difficult. Ultimately, teaching seminars, especially through the vehicle of legal literature, affords both professors and their students the luxury of variety and deep intellectual engagement. Every day, I am grateful for the professional satisfaction and independence that goes along with being an academic. The seminar experience exemplifies these benefits, and I always feel lucky to be able to participate in this type of educational endeavor.

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or, DePaul College of Law Center for Intellectual Property Law and Information Technology. Many thanks to Irene Calboli and Michael Madison for helpful comments and suggestions.

[FN1]. On the right of publicity, see Alice Haemmerli, Whose Who? The Case for a Kantian Right of Publicity, 49 Duke L.J. 383 (1999); Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 Tex. L. Rev. 923 (1999); Roberta Rosenthal Kwall, Fame, 73 Ind. L.J. 1 (1997); Roberta Rosenthal Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47 (1994); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125 (1993). On moral rights, see Roberta Rosenthal Kwall, The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a), 77 Wash. L. Rev. 985 (2002); Roberta Rosenthal Kwall, Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century, 2001 U. Ill. L. Rev. 151 (2001); Ilhyung Lee, Toward an American Moral Rights in Copyright, 58 Wash. & Lee L. Rev. 795 (2001); Neil Netanel, Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation, 24 Rutgers L.J. 347 (1993); Russ VerSteeg, Federal Moral Rights for Visual Artists: Contract Theory and Analysis, 67 Wash. L. Rev. 827 (1992).

[FN2]. Roberta Rosenthal Kwall, The Soul of Creativity: Should Intellectual Property Law Protect the Integrity of a Creator's Work? (Stanford Univ. Press forthcoming 2009-2010).

[FN3]. The law review articles I assigned this year include: Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. Davis L. Rev. 1151 (2007); Abraham Drassinower, Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law, 1 U. Ottawa L. & Tech. J. 105 (2004); Dotan Oliar, Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power, 94 Geo. L.J. 1771 (2006); Cyrill P. Rigamonti, Deconstructing Moral Rights, 47 Harv. Int'l L.J. 353 (2006).

[FN4]. I am aware of the following colleagues who have adopted the legal literature format to some degree: Irene Calboli (Trademarks; IP Theory); Rochelle Dreyfuss (rotating topics); Dave Fagundes (IP and the Constitution); Jessica Litman (rotating topics); Michael Madison ("Greatest Hits of IP"); Greg Mandel (Advanced Patent Law); Kristen Osenga (Advanced Patent Law); Mark Schultz (Copyright Law); Kathy Strandburg (Advanced Patent Law); and Polk Wagner (Advanced Patent Law).

[FN5]. See infra notes 10-11 and accompanying text.

[FN6]. Peter Jaszi & Martha Woodmansee, The Ethical Reaches of Authorship, 95 S. Atlantic Q. 947, 951 (1996).

[FN7]. See e.g., Diane Leenheer Zimmerman, Is There a Right to Have Something to Say? One View of the Public Domain, 73 Fordham L. Rev. 297, 308- 09 (2004); see generally Pamela Samuelson, Enriching Discourse on Public Domains, 55 Duke L.J. 783 (2006).

[FN8]. In Chicago, we typically spend around or even under $1,000 per speaker. Of course, that figure might be higher for schools in a less centrally located part of the country.

[FN9]. See supra note 4 and accompanying text.

[FN10]. One professor required three fifteen-page papers, and another seminar format did not mandate a final

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paper but instead required students to provide written comments on all works in progress presented (the latter being for a two-credit course).

[FN11]. At the time of this writing, DePaul's seminar requirements mandate this choice.

[FN12]. See Eugene Volokh, Writing a Student Article, 48 J. Legal Educ. 247 (1998).

[FN13]. For many years, my IP seminar was the only IP course DePaul offered, other than a course on patent law. In those years, I used Paul Goldstein's casebook as the text for the seminar. See Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on Intellectual Property Law (5th ed. 2002). Students were expected to write a research paper in lieu of taking an exam. When we began offering a separate, open-enrollment exam course covering copyrights and trademarks, I continued to offer an IP seminar using cases, article excerpts, and student presentations as the basis for the class.

[FN14]. For an example of a comprehensive articulation of expectations for students in a seminar, see Michael J. Madison, Prof. Michael J. Madison's Student Writing Guidelines, Aug. 2, 2007, http:// madisoni-an.net/homepage/writing_instructions.htm (last visited Jan. 15, 2008).

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***855** TEACHING CURRENT TRENDS AND FUTURE DEVELOPMENTS IN INTELLECTUAL PROPERTY

Charles R. McManis [FNa1]

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Introduction

This Article proceeds on the assumption that the ultimate goal of intellectual property law teaching--and legal education generally--is not simply to impart knowledge of the law, but rather to inculcate in students the necessary analytical skills to apply the law to new factual situations. Thus, one of the most important, and challenging, tasks for the intellectual property law teacher is helping law students develop the ability to identify emerging legal issues and predict future legal developments in intellectual property law and policy.

The challenge has become particularly daunting for intellectual property law teachers because of the increasingly dynamic nature of the subject matter. This dynamism is the product of rapid global developments in three overlapping fields: international law, technology, and commerce.

Until 1994, for example, the field of international intellectual property law was largely governed, as it had been for the past century, by the Paris Convention for the Protection of Industrial Property [FN1] and the Berne Convention for the Protection of Literary and Artistic Works. [FN2] The modest goals of these two conventions were: (1) to ensure that foreign nationals were provided "national [i.e., non-discriminatory] treatment" with respect to whatever intellectual property protection a member chose to grant its own ***856** nationals; [FN3] (2) to establish an international priority system for industrial property; [FN4] and (3) to establish some initially modest international minimum standards for the prevention of unfair competition and the protection of literary and artistic works. [FN5] In 1967, the administration of these two conventions was vested in a new international agency, the World Intellectual Property Organization (WIPO), which was also to promote the protection of intellectual property throughout the world. [FN6] In 1994, however, the field of international intellectual property law underwent a tectonic shift with the promulgation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [FN7] one of a bundle of agreements that were to be administered by the newly established World Trade Organization (WTO). [FN8]

The TRIPS Agreement essentially thrust the protection of intellectual property into the heart of international trade law by obligating all members of the WTO to comply with a detailed set of international minimum standards for intellectual property protection and enforcement, [FN9] and provided that any member disputes over TRIPS implementation were to be submitted to the WTO dispute settlement process. [FN10] Suddenly, the WIPO, which had unsuccessfully sought to develop a consensus among its members on international minimum standards for intellectual property protection, found itself cast in a new international role as the international agency responsible for keeping pace with rapid technological developments, identifying emerging intellectual property law issues, and developing appropriate international law and policies to deal with those emerging issues, while leaving it to the WTO to obtain compliance with the TRIPS international minimum standards for in-

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tellectual property protection and enforcement. [FN11]

***857** The two technology fields that have offered the most significant challenges for international intellectual property policy development are digital technology and biotechnology. For example, even as the TRIPS Agreement was being finalized, the Internet and biotechnology revolutions were gathering force, leading many commentators to criticize the TRIPS Agreement as an essentially backward-looking document that largely failed to address emerging technologies and associated intellectual property issues. [FN12] TRIPS did, of course, specify: (1) that computer programs are to be protected as literary works under the Berne Convention; [FN13] (2) that databases which by reason of the selection or arrangement of their contents constitute intellectual creations are to be protected as such; [FN14] (3) that micro-organisms and microbiological processes are patentable subject matter; [FN15] and (4) that plant varieties are to be protected either by patents or by an effective sui generis system or by any combination thereof. [FN16] At the same time, however, the TRIPS Agreement left unanswered many of the emerging intellectual property questions being spawned by the digital and biotechnology revolutions.

Just two years after the TRIPS Agreement was adopted, for example, the WIPO found it necessary to convene an international conference to address the digital revolution by drawing up a new pair of treaties, the WIPO Copyright Treaty [FN17] and the associated WIPO Performances and Phonograms Treaty. [FN18] The WIPO Copyright Treaty made it clear that computer programs are literary works under the Berne Convention; [FN19] recognized an exclusive rental right for computer programs, cinematographic works, and works embodied in phonograms; [FN20] and explicitly recognized an exclusive right to authorize communication to the public of a copyrighted work by wire or wireless means. [FN21] It also imposed two new "para-copyright" obligations to prevent circumvention of effective technological measures to prevent unauthorized use of copyrighted works and to provide effective remedies against the knowing removal or alteration of any electronic rights management information ***858** (including terms and conditions of use of the work) without authorization. The WIPO Performances and Phonograms Treaty created similar "para-copyright" obligations with respect to phonograms. [FN22] The WIPO also considered, but ultimately decided not to adopt, a proposed database protection treaty modeled on the European Union Database Directive, which mandates the creation of a new sui generis form of intellectual property protection for databases. [FN23]

Meanwhile, on the international trade front, the WTO by 1999 found itself confronting the unruly phenomenon of globalization and its discontents, as its Ministerial Conference in Seattle collapsed amidst violent and tear-gas beclouded anti-globalization protests. [FN24] This reversal stimulated the issuance of the Doha Declaration in 2001, [FN25] in which the WTO conceded that it needed to be more sensitive to the needs and interests of developing countries. Specifically, the Doha Declaration stressed that the TRIPS Agreement was to be interpreted in a manner supportive of public health, by promoting access to existing medicines and research and development into new medicines, as spelled out in a separate declaration acknowledging the gravity of the public health problems afflicting many developing and less developed countries. [FN26] Eventually, that separate WTO Declaration on the TRIPS Agreement and Public Health [FN27] led to the first modification of the TRIPS Agreement, relaxing Article 31's strict limitations on compulsory licensing to enable one member to supply another member with patented pharmaceuticals without the authorization of the patent holder. [FN28] In addition, at the urging of developing countries, the Doha Declaration specifically directed the TRIPS Council to ***859** examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity, as well as the protection of traditional knowledge and folklore. [FN29] Notwithstanding the issuance of these two declarations, and the ambitious goals set for the Doha Round of multilateral trade negotiations, the accomplishments thus far have been modest, and the negotiations are in danger of deadlocking on agricultural subsidies and access to the

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agricultural markets in the industrialized world, and consequently imperiling implementation of the TRIPS Agreement in the developing world.

These, then, represent some of the emerging international intellectual property issues that intellectual property teachers will need to address. The objective of this Article is to suggest how intellectual property teachers can best do that.

One option, of course, is to include in each course devoted to a specific field of intellectual property law (patents, copyrights, trademarks, etc.) a component that specifically deals with emerging issues, particularly those issues involving international intellectual property law. If the experience of the Author of this Article is any guide, however, both emerging intellectual property issues and international intellectual property law tend to get short shrift in basic introductory intellectual property courses, particularly if they are tacked on as the final two topics to be covered in the course. A skilled teacher may be able to touch on one of these two topics in an introductory course, but seldom is there time to cover both adequately, particularly if the particular introductory course also covers an ancillary field of intellectual property or unfair competition law, such as utility models, industrial designs, trade secrets, semiconductor chip design, or plant variety protection. The challenge is still more daunting in a general introductory intellectual property course seeking to offer an across-the-board introduction to patent, copyright, and trademark law.

On the other hand, conceptualizing courses devoted exclusively to emerging intellectual property law issues or to international intellectual property law presents its own challenges, as such courses can be unworkable or unwieldy as a practical matter. A teacher offering a course devoted exclusively to emerging intellectual property law issues will need to develop his or her own teaching materials and will probably need to require students to have taken one or more introductory intellectual property courses as a prerequisite. Even then such a course may be unworkable, as students will not necessarily have the same grounding in the same areas of basic intellectual property law. Teachers of international intellectual property law courses may likewise need to develop their own materials and establish prerequisites for the course. Here, too, the course may prove to be unworkable or unwieldy, particularly if the objective of the course is to provide students with a ***860** comprehensive introduction to all of the existing international intellectual property agreements.

However, the twin challenges of teaching emerging intellectual property issues and teaching international intellectual property law offer the potential for a single integrated solution to both challenges. The basic hypothesis that will guide the discussion in the remainder of this Article is that a workable approach to teaching emerging intellectual property issues is to utilize these issues as organizing themes or topics to give focus to a basic international intellectual property law course or seminar. Specifically, this Article will describe a basic international intellectual property course that the Author has successfully taught in a variety of contexts to a wide range of students, many of whom had no prior background in intellectual property law. [FN30] The educational objective of this course is to introduce students to intellectual property law generally and international intellectual property law in particular, while at the same time helping students identify and analyze emerging intellectual property law issues.

The course is organized around a number of topics and sub-topics, beginning with the general topic, intellectual property and international trade, followed by an examination of the specific legal issues raised by digital technology and biotechnology, respectively. The reading for the course consists entirely of primary international legal materials and selected secondary sources, most of which can be accessed online, and examples of which will be provided in footnotes throughout this Article. [FN31] The two primary pedagogical methods to be em-

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ployed in the course are: (1) engaging in a close reading and analysis of basic legal texts; and (2) utilizing these texts to identify and analyze specific emerging issues of international intellectual property law.

***861** I. Topic I: Intellectual Property and International Trade

The initial objective is to introduce students to the TRIPS Agreement and the intellectual property issues that it addresses, particularly those identified in the Doha Declaration. [FN32] Indeed, the TRIPS Agreement and the Doha Development Agenda provide the basic legal anatomy for the course as a whole. [FN33]

For example, Article 1.2 of the TRIPS Agreement offers students a working definition of what constitutes "intellectual property" for purposes of the TRIPS Agreement and simultaneously introduces students to the basic anatomy of Part II of TRIPS, which specifies the international minimum standards concerning the availability, scope, and use of seven discrete types of intellectual property and the control of anti-competitive practices in contractual licenses. [FN34] From these structural elements in the TRIPS Agreement, the teacher should be able to help students develop a matrix, or chart, for use throughout the course, integrating the various types of intellectual property law and the three basic phases of intellectual property practice (acquisition, enforcement, and licensing or transfer of rights). Across the top of the chart is the spectrum of intellectual property and related rights (copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information). Down the side of the chart are the three phases of intellectual property practice, which can be subdivided as follows:

1. Acquisition of rights:

(a) subject-matter protected; and

(b) substantive and procedural requirements for obtaining protection.

2. Enforcement of exclusive rights:

(a) scope and term of exclusive rights; and

(b) prima facie infringement (including ownership of rights, directly infringing acts, active inducement, contributory infringement, and vicarious liability); defenses; and remedies.

***862** 3. Licensing and Transfer of rights:

(a) licensing (voluntary and compulsory); and

(b) assignment (sale, gift, testamentary transfer). In short, this "IP Law and Practice" matrix offers a way for students to examine the law and practice of intellectual property as a whole and to fit the particular provisions of the TRIPS Agreement into a larger mosaic.

For example, an examination of the table of contents of the TRIPS Agreement will make it clear that, in addition to establishing minimum standards for the protection of intellectual property in Part II, the TRIPS Agreement also establishes minimum enforcement standards in Part III, minimum administrative and procedural standards for the acquisition and maintenance of intellectual property rights in Part IV, and at the same time establishes a system for international dispute settlement among its members in Part V, while addressing various transitional and institutional arrangements in Parts VI and VII. [FN35] Article 2, in turn, not only makes reference to Parts II, III, and IV of the TRIPS Agreement, [FN36] but also refers to the primary existing intellectual property agreements, namely the Paris Convention, the Berne Convention, and the Rome Convention. This provides the teacher with the opportunity to identify the basic subject matter protected by these Conventions, as suggested by their full titles in footnote two (i.e., industrial property, literary and artistic works, and "neighboring rights" with respect to performances, phonograms, and broadcasts). [FN37]

Likewise, Article 2, taken together with Articles 3, 4, and 5, offers an opportunity to introduce students to

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the concepts of national (or non-discriminatory) treatment and most-favored-nation treatment, and to the WTO's companion international agency, the World Intellectual Property Organization. This discussion, in turn, will enable the teacher to distinguish the limited objectives of the Paris, Berne, and Rome Conventions from the more ambitious objectives of the TRIPS Agreement. Examining Articles 2 through 5 of the TRIPS Agreement will also provide a springboard for introducing the role of the WIPO in administering the Paris, Berne, and Rome Conventions, as well as related supplementary treaties, such as the Patent Cooperation Treaty, the Madrid Agreement and Protocol on the International Registration of Marks, the Lisbon Agreement for the Protection for Appellations of Origin and their International Registration, etc. [FN38]

***863** The foregoing introduction will also lay the groundwork for an initial foray into Part II of the TRIPS Agreement, where Articles 9 and 10, respectively, offer an example of an intellectual property topic TRIPS specifically declines to address (i.e., moral rights of authors), thus deferring to the exclusive competence of the WIPO, [FN39] and an example of a more interventionist TRIPS provision, which specifies that computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention. [FN40] It is worth pointing out to students that the latter provision amounts to a de facto "amendment" of the Berne Convention--an amendment that was given de jure status with the promulgation of the WIPO Copyright Treaty in 1996. The teacher can also ask students to consider why the TRIPS Agreement is deferential on the topic of moral rights, but not on the protection of computer programs, thus highlighting the fact that not all intellectual property issues are "trade-related."

A comparative analysis of the substantive international minimum standards for intellectual property protection contained in Part II, Sections 1 through 7 of the TRIPS Agreement, in turn, should enable the students to see that each section is organized in accordance with the "IP Law and Practice" matrix described above--i.e., each section enumerates the subject matter and standards for protection first, followed by articles specifying the scope, term, and limitations of exclusive rights, and concluding with any relevant articles concerning licensing and assignment, as further qualified by Section 8's single article permitting WTO members to control anticompetitive licensing practices. Likewise, an examination of Part III should provide the students with a basic understanding of the international minimum procedural and remedial standards for intellectual property protection.

With the completion of this basic introduction to the TRIPS Agreement and to international intellectual property law generally, the students are now equipped to consider some of the interpretive disputes that might be raised in the WTO dispute settlement process, incorporated by reference in Part V of the TRIPS Agreement, over the meaning of various TRIPS provisions. At this point, the teacher may ask students to read selected WTO dispute settlement decisions, as these decisions are readily accessible online. [FN41] Once the students have gotten a general overview of the types of disputes that have already been submitted for WTO resolution, the course can then turn to the first of two general categories of emerging legal issues to be considered in the remainder of the course--namely those generated by digital technology.

***864** II. Topic II: Digital Technology

As suggested above, an initial foray into Part II of the TRIPS Agreement will immediately confront students with a concrete example of a fundamental copyright issue arising as a result of the emergence of digital technology-- namely whether computer software in all of its forms should be classified and protected as literary works. The protection of computer programs is an ideal place to begin a discussion of emerging IP issues, as it offers a good example of a "hybrid" subject matter that might be protectable under more than one form of intellectual property law. [FN42]

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After all, a computer program in source-code (i.e., human-readable) form clearly appears to qualify as a copyrightable literary work, but that same program in object-code (i.e., machine-readable) form seems to perform more like a machine part, and when embedded in an integrated circuit, even looks more like a machine part than a literary work. Likewise, a computer program can be widely distributed in object-code form, while closely guarded as a trade secret in source-code form. Were trade secret law the only form of protection available for computer programs, it would clearly seem to be permissible to reverse engineer a publicly distributed computer program, as reverse engineering of publicly distributed products is a well-established permissible means of acquiring the trade secrets of others, but reverse engineering of software also amounts to reproducing, or at least translating, the program, which violates one or more of the exclusive rights conferred by copyright law. Finally, a computer program not only gives instructions to a machine, but also generates separate works on a computer screen, and those works, in turn, may be literary works, pictorial, graphic, or motion picture works, and may also be accompanied by musical works that are also generated by the computer program. Some elements of these screen displays may be so highly distinctive as to constitute trademarks, some elements may be highly functional (e.g., icons), and all are arguably a digital form of trade dress, in addition to being copyrightable subject matter.

If the teacher wishes to provide students with a comparative, as well as an international, introduction to intellectual property law, while exploring specific ***865** intellectual property issues that have been generated by digital technology, this may be accomplished by comparing the U.S. and European approaches to three specific controversies involving digital technology-- namely: (1) the interoperability debate; (2) the mass-market (shrink-wrap and click-wrap) licensing debate; and (3) the database protection debate. For example, the teacher may ask students to examine the E.C. Directive on the Legal Protection of Computer Programs [FN43] and assign readings that compare the U.S. and E.U. approaches to the software reverse engineering and interoperability debate. [FN44] Students may also be asked to read materials comparing the U.S. and E.U. approaches to mass-market licensing of computer programs. [FN45] Finally, the students may be asked to read the E.U. Database Directive, [FN46] which creates a new sui generis form of intellectual property protection for the non-copyrightable contents of databases, and read materials comparing the U.S. and E.U. approaches to database protection. [FN47]

This final topic offers a particularly good opportunity to explore the difference between "national treatment" and "material reciprocity," as the E.U. Database Directive contains a material reciprocity provision, limiting sui generis database protection to nationals or habitual residents of E.U. member countries, businesses having a registered office and ongoing and genuine business links to a E.U. member country, and those foreign nationals of countries that extend comparable protection to databases of nationals or habitual residents of E.U. member countries. [FN48] Whether and to what extent members of the WTO and/or members of the Paris or Berne Conventions can ***866** condition sui generis intellectual property protection for non-nationals on the basis of material reciprocity is an important (albeit abstruse) international intellectual property issue that the TRIPS Agreement itself does not explicitly address. [FN49]

With the emergence of the Internet, whole new congeries of trademark and copyright issues were generated, as savvy web page developers learned to attract "hits" (or develop opportunities for arbitrage) by registering and utilizing the marks of others as domain names ("cybersquatting"). They have also utilized the marks of others as meta-tags to attract the attention of Internet search engines, constructed web pages that "frame" other web pages, and have even adopted domain names consisting of well-known misspellings of the marks or domain names of others ("typosquatting"). Posing a hypothetical fact situation of the latter sort will provide the teacher with a good opportunity to introduce the distinction between consumer confusion as to the source of goods or services

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(the classic harm that trademark law seeks to prevent) and "initial interest" confusion, which merely imposes unwanted initial search costs on the consumer. [FN50]

The teacher may also wish to ask students to consider whether cybersquatting could be said to "dilute" famous marks, and whether, in extending the scope of Article 6bis of the Paris Convention, Article 16.3 of the TRIPS Agreement does or does not require WTO members to protect famous marks against dilution. [FN51] Another way to explore international domain name controversies, while at the same time introducing students to the technology generating these issues, is to assign a cybersquatting research assignment, requiring students to examine online actual domain name controversies decided by the WIPO Arbitration and Mediation Center. [FN52]

This would also be an appropriate point in the course to conduct a detailed study of the WIPO Copyright Treaty and explore national implementation of its two provisions on digital rights management, requiring members to provide ***867** adequate legal protection and effective legal remedies against: (1) the circumvention of effective technological measures designed to prevent copying of a copyrighted work; and (2) persons knowingly removing, altering or deleting electronic rights management information, including terms and conditions of use of the work. [FN53] It is important for students to understand how these requirements can operate in conjunction with mass-market licensing provisions prohibiting reverse engineering, etc., to create what might be called "para-copyright," or "electronic trade secret protection" for authors of digital works, thus making much of conventional copyright law simply irrelevant in a digital environment. [FN54] This particular proprietary approach to the distribution of digital content can also be compared with the burgeoning "open-source" software development model, and implications of the two models for developing countries can be discussed. [FN55] Introducing the concept of "open-source" technology development as a feasible alternative wherever consumers of intellectual property are also innovators is particularly useful at this point, as it will lay the groundwork for explaining the "common heritage" approach to agricultural innovation that is embodied in the "Multilateral System" established by the Food and Agricultural Organization's new International Treaty for Plant Genetic Resources for Food and Agriculture [FN56]--a potential topic of discussion in the second half of the course, as the focus of the course shifts from digital technology to biotechnology and the associated fields of biodiversity, traditional knowledge protection, and public health.

III. Topic III: Biotechnology, Biodiversity, Traditional Knowledge Protection, and Public Health

As noted earlier, the 2001 WTO Ministerial Conference, in its Doha Declaration, specifically directed the TRIPS Council to examine the relationship between the TRIPS Agreement and the Convention on Biological ***868** Diversity, as well as the protection of traditional knowledge and folklore. [FN57] Likewise, in 2000, the WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to facilitate discussion of intellectual property issues that arise in the context of access to genetic resources and the fair and equitable sharing of benefits arising out of the utilization of same, as well as the protection of traditional knowledge, innovations, creativity, and expressions of folklore. [FN58] As these actions by the WTO and WIPO illustrate, a second fundamental emerging legal issue in international intellectual property law is the growing interface with international environmental law. Similarly, the separate WTO Declaration on the TRIPS Agreement and Public Health highlights the growing interface between international intellectual property and public health law. [FN59] Finally, the TRIPS requirement that WTO members protect plant varieties either by patents or by an effective sui generis system or some combination thereof, [FN60] together with the recent promulgation and entry into force of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, highlights the growing interface between international intellectual property and agri-

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cultural law. One or more of these emerging issues could provide a thematic focus for a third and final component of a basic international intellectual property law course or seminar.

One unfortunate consequence of the resort by the industrialized world to the rhetoric of "piracy" in the push to strengthen intellectual property protection in the developing world was that it stimulated a countervailing outcry in the developing world and elsewhere over what has come to be known--and vilified-- as "biopiracy." Biopiracy has been defined as the "appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge." [FN61] One response to the concern over biopiracy was the promulgation of the Convention on Biological Diversity (CBD), the objective of which was to affirm national sovereignty over genetic resources and promote the conservation, sustainable use, and facilitated access to and fair and equitable sharing of the benefits arising from utilization of genetic resources ***869** and any associated traditional knowledge. [FN62] Ironically, the practical effect of the CBD has been to inhibit, rather than to facilitate, access to genetic resources in the developing world, thus heightening the urgency of developing a more equitable system of benefit-sharing if medical and agricultural biotechnology is to continue to have access to genetic resources as a starting point for research and development. [FN63]

The biopiracy controversy has produced a number of specific proposals on the part of developing countries to modify the existing intellectual property regime to make it more responsive to developing country needs and interests, and particularly to promote more equitable benefit-sharing. [FN64] In response to these proposals, the Doha Declaration directed the TRIPS Council to examine the relationship between the TRIPS Agreement and the CBD, as well as the protection of traditional knowledge and folklore, [FN65] and the WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. [FN66]

The specific intellectual property proposals that have surfaced in international discussions thus far can be divided into three categories: (1) proposals to provide more effective defensive protection of public domain genetic resources and traditional knowledge by expanding the definition of "prior art" and/or creating and improving access to documentation of public domain genetic resources and traditional knowledge in online databases and digital libraries; (2) proposals to promote a more fair and equitable sharing of the benefits of genetic resources and associated traditional knowledge, as mandated by the CBD, by requiring disclosure of origin of any relevant genetic resources and associated traditional knowledge and evidence of prior informed consent of the providers of same as a condition either for filing a patent application or for enforcing an otherwise valid patent; and (3) proposals to create a new sui generis form of affirmative intellectual property protection for ***870** traditional knowledge. [FN67] One or more of these specific proposals, together with the threshold question whether and to what extent existing intellectual property and unfair competition law in fact provides defensive and/or affirmative protection for traditional knowledge, could be the focus of a specific class assignment or research problem. Asking students to compare the potential impact of a disclosure of origin and evidence of prior informed consent requirement, based on whether it is imposed as a condition for acquiring a patent or as a condition for enforcing a patent, provides an opportunity to examine practical aspects of the patent acquisition and enforcement process. As a practical matter, imposing such a requirement as a condition for acquiring a patent would impose a crushing burden on patent offices lacking any expertise to judge the sufficiency of the disclosure, whereas imposing such a requirement as a condition for enforcing an otherwise valid patent would focus the patent system on those few biotechnology patents sufficiently valuable to be worth enforcing, and thus capable of generating benefits. [FN68]

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As we have seen, a second emerging issue with respect to intellectual property protection for medical biotechnology, and pharmaceutical products more generally, is the concern over TRIPS and public health. [FN69] This issue starkly reveals the inherent tension in a system for stimulating innovation through incentives based on the temporary grant of exclusive intellectual property rights. [FN70] The incentives provided by the patent system are arguably the most efficient means for promoting modern medical biotechnology and pharmaceutical research and development. At the same time, however, without some modification of the exclusive rights provided by the patent system, the benefits of modern medical biotechnology and pharmacology will be beyond the financial reach of much of the developing world. For that reason, one of the most controversial provisions in TRIPS is its requirement that patent protection be extended to pharmaceutical products. [FN71] Although ***871** Article 31 of the TRIPS Agreement in theory permits WTO members to resort to government-mandated compulsory licensing as a permissible response to a public health emergency, this tool has remained out of reach for developing countries that lack a domestic industrial capacity to respond to the health crisis, as compulsory licensing under Article 31(f) of TRIPS is permissible only where "predominantly for the supply of the domestic market of the Member authorizing such use." [FN72] Recognition of this shortcoming in Article 31 has produced the first modification in the TRIPS Agreement, [FN73] which was designed to make permanent the Decision of August 30, 2003, waiving the foregoing limitation on compulsory licensing. [FN74] Examination of the online materials tracing the negotiations that led to this modification thus offers an opportunity to study the role of the WTO's TRIPS Council in developing international intellectual property policy. [FN75]

A third emerging biotechnology-related international intellectual property issue involves agricultural biotechnology and plant variety protection. [FN76] While Article 27.3 of the TRIPS Agreement permits WTO members to exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes, it includes a proviso specifying that plant varieties are to be protected either by patents or by an effective sui generis system or by any combination thereof. [FN77]

The proviso in Article 27.3 clearly does not require WTO members to adhere to the latest (1991) revision (or for that matter any other version) of the International Convention for the Protection of New Varieties of Plants (UPOV), [FN78] but it does require WTO members to provide "effective" plant ***872** variety protection of some sort. A number of developing countries opted to adhere to the earlier and more limited 1978 revision of UPOV, and they were allowed to join UPOV just before UPOV 1978 was superseded by UPOV 1991. [FN79] However, because UPOV 1991 has superseded UPOV 1978, it could be argued under TRIPS Article 27.3 that UPOV 1978 does not in fact provide "effective" sui generis protection for plant varieties, thus suggesting a potential dispute as to what does and does not constitute "effective" sui generis plant variety protection.

Another potential dispute that could arise under TRIPS Article 27.3 stems from the fact that at least some developing country WTO members have interpreted Article 27.3 to permit the exclusion of "the whole or part of natural living beings and biological materials found in nature, or isolated therefrom, including the genome or germplasm of any natural living being." [FN80] That interpretation is likely to be challenged by industrialized WTO members as inconsistent with Article 27.1 and submitted to the WTO dispute settlement process for eventual resolution. [FN81]

Also relevant to the protection of agricultural biotechnology and plant varieties is the recently adopted FAO International Treaty on Plant Genetic Resources for Food and Agriculture, [FN82] which will govern access to most materials in national and international germplasm collections (more than 6 million accessions in some 1,300 collections around the world) as well as to in situ and on-farm sources. [FN83] The FAO International

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Treaty was negotiated with the understanding that it would be in harmony with the Convention on ***873** Biological Diversity, and is similar to the CBD in its overall objectives to promote the conservation, sustainable use, and equitable sharing of benefits arising out of the use of plant genetic resources for food and agriculture, as well as associated traditional agricultural knowledge, for sustainable use and food security. [FN84] However, the FAO Treaty also goes well beyond the CBD, in that it builds on an existing national and international system of ex situ germplasm collections of genetic resources for food and agriculture, namely the Consultative Group on International Agricultural Research (CGIAR), [FN85] and creates a formal "Multilateral System"--i.e., a system of "common-pool goods"--in thirty-six genera of crops and twenty-nine genera of forages, designed to provide "facilitated" (i.e., free or low cost) access to these genetic resources, and to ensure an equitable sharing of the benefits derived from any commercialized product that incorporates materials from the Multilateral System. [FN86]

A critical feature of the "facilitated access" that the FAO Treaty seeks to promote is that recipients of genetic plant genetic resources covered by the Multilateral System are not to "claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System." [FN87] The FAO Treaty also pays lip-service to the concept of "Farmers' Rights" [FN88] as well as to a corresponding farmers' privilege to save ***874** and sell farm-propagated seeds. [FN89] How the foregoing provisions are to be reconciled with the TRIPS requirement that all WTO members provide "for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof," [FN90] is not specified. However, the prohibition against claiming intellectual property rights is restricted to plant genetic resources, or their genetic parts, or components, "in the form received from the Multilateral System," [FN91] suggesting that plant variety protection can be sought for varieties derived from these starting materials. Moreover, the FAO Treaty specifies that germplasm from the Multilateral System is to be available under the terms of a standard material transfer agreement (MTA), which is to include provisions for benefit sharing in the event of commercialization of products developed using genetic resources received from the Multilateral System. [FN92] This, too, suggests that plant variety protection may be sought for plant varieties derived from genetic resources received from the Multilateral System, though subject to the Treaty's benefit-sharing requirements. In this respect, the FAO Treaty seems somewhat analogous to the "open-source" approach to software development, which requires source (i.e., human-readable) code to be distributed with the open-source software itself, but permits a programmer to modify the software and release the modified version under terms that are proprietary. [FN93]

The stronger the intellectual property protection provided for plant varieties (including those varieties developed by innovative farmers), the more market-produced economic benefits there will likely be available to share under the FAO Treaty's benefit-sharing provisions. Conversely, the broader the definition of any legally recognized "Farmers' Right" or farmers' privilege in plant variety protection legislation, the more likely it is that the benefits ***875** emanating from the Multilateral System will consist primarily of the publicly improved plant varieties as such. [FN94] In any event, the ultimate success or failure of benefit-sharing provisions of the FAO International Treaty will depend in significant part on the ability (and willingness) of participating germplasm collections to enforce benefit sharing terms in applicable MTAs and the ability of the Governing Body responsible for administering the Treaty to reach a consensus as to the level, form, and manner of payment of an "equitable" sharing of monetary benefits. [FN95]

In any event, a comparative study of the FAO International Treaty, UPOV, and the TRIPS Agreement, offers a good opportunity to compare several alternative systems for promoting agricultural innovation, ranging from "free" to "open-source" to purely proprietary systems, and will thus put in broader perspective the question

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as to what constitutes "effective" protection of plant varieties within the meaning of the TRIPS Agreement. Such a study also offers the opportunity to conclude the course with a comparative examination of the dynamics of software and plant innovation.

Conclusion

This Article has sought to demonstrate that one effective way to introduce students to current trends and future developments in intellectual property law is by studying these trends and developments in the context of an introductory international intellectual property course organized around three general themes or topics: (1) intellectual property and international trade; (2) digital technology; and (3) biotechnology, biodiversity, traditional knowledge, and public health. There are a number of advantages to this approach. First, it will enable the teacher to focus on emerging issues of intellectual property law throughout a single introductory course, rather than addressing these issues in separate introductory patent, copyright, and trademark courses. Second, the course can be offered as an introductory course, without any need to require pre-requisite courses. Third, the course can be taught using materials that are largely, if not entirely, available online. Fourth and finally, it will provide a policy-based focus for the study of international intellectual property law.

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[FN1]. Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, available at http://wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf (last visited Jan. 15, 2008).

[FN2]. Concluded July 24, 1971, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3, available at http://wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf (last visited Jan. 15, 2008).

[FN3]. See Paris Convention, supra note 1, art. 2(1).

[FN4]. See id.

[FN5]. Id. art. 10bis.

[FN6]. See Convention Establishing the World Intellectual Property Organization art. 3, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3, available at http://wipo.int/export/sites/www/treaties/en/convention/pdf/trtdocs_wo029.pdf (last visited Jan. 15, 2008).

[FN7]. Concluded Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, available at http:// www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Jan. 15, 2008) [hereinafter TRIPS Agreement].

[FN8]. For the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 and related agreements to be administered by the WTO, see World Trade Organization, WTO Legal Texts, http:// www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Jan. 15, 2008).

[FN9]. See generally TRIPS Agreement, supra note 7.

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[FN10]. Id. art. 64.

[FN11]. See generally Agreement Between the World Intellectual Property Organization and the World Trade Organization, WIPO-WTO, Dec. 22, 1995, 35 I.L.M. 754, available at http:// wipo.int/export/sites/www/treaties/en/agreement/pdf/trtdocs_wo030.pdf (last visited Jan. 15, 2008).

[FN12]. See, e.g., J.H. Reichman, The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions, 17 Hastings Comm. & Ent. L.J. 763, 765-66 (1995).

[FN13]. TRIPS Agreement, supra note 7, art. 10.1.

[FN14]. Id. art 10.2.

[FN15]. Id. art. 27.

[FN16]. Id. art. 27.3(b).

[FN17]. Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 1 (1997), 36 I.L.M. 65, available at http:// wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf (last visited Jan. 15, 2008).

[FN18]. Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997), 36 I.L.M. 76, available at http:// wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf (last visited Jan. 15, 2008).

[FN19]. WIPO Copyright Treaty, supra note 17, art. 4.

[FN20]. Id. art. 7.

[FN21]. Id. art. 8.

[FN22]. WIPO Performances and Phonograms Treaty, supra note 18, arts. 18-19.

[FN23]. World Intellectual Property Organization, Basic Proposal for the Substantive Provision of the Treaty on Intellectual Property in Respect of Databases To Be Considered by the Diplomatic Conference, WIPO Doc. CRNR/DC/6 (Dec. 2-20, 1996), available at http:// www.wipo.int/documents/en/diplconf/pdf/6dc_e.pdf (last visited Jan. 15, 2008); World Intellectual Property Organization, Recommendation Concerning Databases, at 2, WIPO Doc. CRNR/DC/100 (Dec. 2-20, 1995), available at http:// www.wipo.int/documents/en/diplconf/distrib/pdf/100dc.pdf (last visited Jan. 15, 2008).

[FN24]. See Sam Howe Verhovek & Steven Greenhouse, Seattle Is Under Curfew After Disruptions, N.Y. Times, Dec. 1, 1999, at A1.

[FN25]. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http:// www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (last visited Jan. 15, 2008) [hereinafter Doha Declaration].

[FN26]. Id. ¶ 17.

[FN27]. World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)DEC/2, 41 I.L.M 755 (2002), available at ht-

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tp://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_ trips_e.pdf (last visited Oct. 25, 2007).

[FN28]. See Press Release, World Trade Organization, Members OK Amendment to Make Health Flexibility Permanent, (Dec. 6, 2005), http:// www.wto.org/english/news_e/pres05_e/pr426_e.htm.

[FN29]. Doha Declaration, supra note 25, ¶ 19.

[FN30]. In addition to teaching the course as a basic introductory intellectual property law course to rising second year students at Washington University, the Author has also taught the course to a combination of U.S. and European law students enrolled in two different summer law programs in Europe-- the University of San Diego 2001 London Institute on International and Comparative Law and the 2006 Summer Institute for Global Justice, jointly sponsored by Washington University School of Law in St. Louis, Case Western Reserve University School of Law, and Utrecht University. See Summer Institute for Global Justice in the Netherlands, http://law.case.edu/summer-institute (last visited Oct. 25, 2007).

[FN31]. For a comprehensive set of online materials that can be employed to teach the course described in this Article, see the Final Report of the Commission on Intellectual Property Rights and accompanying study papers and other documents. Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy (2002), available at http://www.iprcommission.org/graphic/documents.htm (last visited Oct. 25, 2007) [hereinafter IPR Commission Final Report].

[FN32]. See supra notes 24-29 and accompanying text.

[FN33]. In addition to the TRIPS Agreement itself, reading materials for this segment of the course could consist of Chapter 1: Intellectual Property and Development, IPR Commission Final Report, supra note 31, at 11-28.

[FN34]. See TRIPS Agreement, supra note 7, arts. 1.2, 9-40.

[FN35]. TRIPS Agreement, supra note 7.

[FN36]. See id. art. 2.

[FN37]. See id. art. 1, n.2.

[FN38]. For the texts of the twenty-four treaties administered by the WIPO, see World Intellectual Property Organization, WIPO-Administered Treaties, http://www.wipo.int/treaties/en/ (last visited Oct. 25, 2007).

[FN39]. See TRIPS Agreement, supra note 7, art. 9.

[FN40]. See id. art. 10.

[FN41]. See World Trade Organization, Index of Disputes Issues, TRIPS section, http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm #trips (last visited Jan. 15, 2008).

[FN42]. For possible introductory readings on this topic, see Chapter 5: Copyright, Software and the Internet, IPR Commission Final Report, supra note 31, at 95-110; Charles R. McManis, Taking TRIPS on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology, 41 Vill. L. Rev. 207 (1996) [hereinafter McManis, Taking TRIPS on the Information Superhighway]. For a discussion of what industries will benefit most and least from the TRIPS Agreement, see Charles R. McManis, Intellectual

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Property and International Mergers and Acquisitions, 66 U. Cin. L. Rev. 1283 (1998). For a discussion of the challenges confronting the WIPO and WTO in regulating intellectual property rights in the information age, see Pamela Samuelson, Challenges for the World Intellectual Property Organization and the Trade-related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age, Eur. Intell. Prop. Rev., Nov. 1999, at 578.

[FN43]. Council Directive 91/250/EEC, 1991 O.J. (L 122) 41 (EC), available at http://wiretap.area.com/Gopher/Gov/Other/copyrigh.ec (last visited Jan. 15, 2008).

[FN44]. For possible introductory readings on this topic, see Charles R. McManis, Intellectual Property Protection and Reverse Engineering of Computer Programs in the United States and the European Community, 1993 High Tech. L.J. 25 (1993); McManis, Taking TRIPS on the Information Superhighway, supra note 42.

[FN45]. For possible introductory readings on this topic, see Catherine L. Mann, Balancing Issues and Overlapping Jurisdictions in the Global Electronic Marketplace: The UCITA Example, 8 Wash. U. J.L. & Pol'y 215 (2002); McManis, Taking TRIPS on the Information Superhighway, supra note 42; Pamela Samuelson & Kurt Opsahl, Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy, Eur. Intell. Prop. Rev., Aug. 1999, at 386.

[FN46]. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20 (EU), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML (last visited Jan. 15, 2008) [hereinafter EU Database Directive].

[FN47]. For possible introductory readings on this issue, see F.W. Grosheide, Database Protection--The European Way, 8 Wash. U. J.L. & Pol'y 39 (2002); Charles R. McManis, Database Protection in the Digital Information Age, 7 Roger Williams U. L. Rev. 7 (2001) [hereinafter, McManis, Database Protection].

[FN48]. See EU Database Directive, supra note 46, art. 11, recital 56.

[FN49]. For a discussion of this issue, see McManis, Taking TRIPS on the Information Superhighway, supra note 42, at 258-59, and authorities cited therein.

[FN50]. See, e.g., Elecs. Boutique Holdings Corp. v. Zuccarini, 56 U.S.P.Q.2d 1705, 1708, 1711-12 (2000), No. Civ.A 00-4055, 2000 WL 1622760, at * 2, *6 (E.D. Pa., Oct. 30, 2000) (finding sufficient consumer injury where a consumer mistakenly types a misspelled domain name and is "mousetrapped," i.e., subjected to a barrage of advertising windows which cannot be exited without clicking through the entire succession of advertisements).

[FN51]. See TRIPS Agreement, supra note 7, art. 16.3. For possible introductory readings on this issue, see Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 111 (Street & Maxwell Ltd. 1998); Paul J. Heald, Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game, 88 Minn. L. Rev. 249 (2003); J. Thomas McCarthy, Dilution of a Trademark: European and United States Law Compared, 94 Trademark Rep. 1163 (2004).

[FN52]. WIPO Domain Name Decisions, http:// arbiter.wipo.int/domains/decisions/index.html (last visited Jan. 15, 2008).

[FN53]. See WIPO Copyright Treaty, supra note 17, arts. 11-12. For a possible introductory reading on the

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WIPO Copyright Treaty, see Thomas C. Vinje, The New WIPO Copyright Treaty: A Happy Result in Geneva, 5 Eur. Intell. Prop. Rev. 230 (1997).

[FN54]. For possible introductory readings on this point, see McManis, Database Protection, supra note 47; McManis, Taking TRIPS on the Information Superhighway, supra note 42.

[FN55]. For a possible introductory reading on this point, see Chapter 5: Copyright, Software and the Internet, IPR Commission Final Report, supra note 31, 95-110; United Nations Conference on Trade and Development, Chapter 4, Free and Open-source Software: Implications for ICT Policy and Development, in E-Commerce and Development Report 2003 [hereinafter UNCTAD E-Commerce Report], available at http://www.unctad.org/en/docs/ecdr2003_en.pdf (last visited Jan. 15, 2008).

[FN56]. International Treaty on Plant Genetic Resources for Food and Agriculture, June 29, 2004, available at ftp:// ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf (last visited Jan. 15, 2008) [hereinafter FAO Treaty], discussed infra notes 82-95 and accompanying text.

[FN57]. See supra note 29 and accompanying text.

[FN58]. World Intellectual Property Organization, Intergovernmental Committee, http://www.wipo.int/tk/en/igc/ (last visited Jan. 15, 2008).

[FN59]. See WTO Declaration on the TRIPS Agreement and Public Health, supra note 27.

[FN60]. TRIPS Agreement, supra note 7, art. 27.3(b).

[FN61]. See ETC Group, The Issues, http://www.etcgroup.org/en/issues (last visited Jan. 15, 2008). This is the definition of biopiracy espoused by the ETC Group (formerly known as RAFI--the Rural Advancement Foundation International), an advocacy organization that believes that "intellectual property is predatory on the rights and knowledge of farming communities and indigenous peoples." Id.

[FN62]. Convention on Biological Diversity preamble, concluded on June 5, 1992, 1760 U.N.T.S. 79. For possible readings on traditional knowledge protection and the relationship between TRIPS and the CBD, see Chapter 4: Traditional Knowledge and Geographical Indications, IPR Commission Final Report, supra note 31, at 73-94; Charles R. McManis, The Interface Between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology, 76 Wash. U. L.Q. 255 (1998).

[FN63]. See UNCTAD-ICTSD Project on IPRs and Sustainable Development, Intellectual Property Rights: Implications for Development 54 (2003), available at http://www.ictsd.org/pubs/ictsd_series/iprs/PP.htm (last visited Nov. 9, 2007),

[FN64]. See infra note 66 and accompanying text.

[FN65]. Doha Declaration, supra note 25, ¶ 19.

[FN66]. See supra text accompanying note 58. For a possible reading on these developments, see Charles R. McManis, Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally, 11 Cardozo J. Int'l & Comp. L. 547 (2003).

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[FN67]. For possible readings on these proposals, see Nuno Pires de Carvalho, From the Shaman's Hut to the Patent Office: In Search of a TRIPS-Consistent Requirement to Disclose the Origin of Genetic Resources and Prior Informed Consent, 17 Wash. U. J.L. & Pol'y 111 (2005); Charles R. McManis, Fitting Traditional Knowledge Protection and Biopiracy Claims into the Existing Intellectual Property and Unfair Competition Framework, in Intellectual Property and Biological Resources 425 (Burton Ong, ed., Marshall Cavendish Int'l 2004); Angela R. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property Protection, 80 Wash. L. Rev. 69 (2005); Sabine Sand, Sui Generis Laws For The Protection Of Indigenous Expressions of Culture and Traditional Knowledge, 22 U. Queensland L.J. 188 (2003).

[FN68]. See generally Carvalho, supra note 67.

[FN69]. See supra notes 27-28 and accompanying text.

[FN70]. For a possible reading on this point, see Chapter 6: Patent Reform, IPR Commission Final Report, supra note 31, at 111-36.

[FN71]. This requirement can be extrapolated from Article 27.1, which requires that patent protection be available for any inventions, whether products or processes, in all fields of technology, and Article 65.4, extending the transitional period for developing countries. TRIPS Agreement, supra note 7, arts. 27.1, 65.4. For a possible reading on this point, see Chapter 2: Health, IPR Commission Final Report, supra note 31, at 29-56.

[FN72]. TRIPS Agreement, supra note 7, art. 31(f).

[FN73]. See World Trade Organization General Council, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 6, 2005), available at http:// www.wto.org/english/tratop_e/trips_e/wtl641_e.htm (last visited Jan. 15, 2008).

[FN74]. See World Trade Organization General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1 (Aug. 30, 2003), available at http:// www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited Jan. 15, 2008).

[FN75]. See generally World Trade Organization, Doha Development Agenda: Negotiations, Implementation and Development, http:// www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Jan. 15, 2008).

[FN76]. For a suggested reading on this topic, see Chapter 3: Agriculture and Genetic Resources, IPR Commission Final Report, supra note 31, at 57-72.

[FN77]. TRIPS Agreement, supra note 7, art. 27.3(b).

[FN78]. See International Convention for the Protection of New Varieties of Plants, opened for signature Dec. 2, 1961, as revised on Mar. 19, 1991, S. Treaty Doc. No. 104-17 (1991), available at http:// www.upov.int/en/publications/conventions/1991/act1991.htm (last visited Jan. 15, 2008) [hereinafter UPOV Convention].

[FN79]. For the members of UPOV 1978 and 1991, see Members of the International Union for the Protection of New Varieties of Plants, http:// www.upov.int/en/about/members/pdf/pub423.pdf (last visited Jan. 15, 2008). UPOV 1991 entered into force on April 24, 1998. Press Release No. 30, International Union For The Protection of New Varieties of Plants, The 1991 Act of the International Convention for Protection of New Varieties of

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Plants (The UPOV Convention) Enters Into Force (Apr. 21, 1998), http://www.upov.int/en/news/pressroom/30.htm (last visited Jan. 15, 2008). Under Article 37(3) of UPOV 1991, no instrument of accession to UPOV 1978 may be deposited after the entry into force of UPOV 1991. UPOV Convention, supra note 78, art. 37(3). Apparently, developing countries that had begun the process of joining UPOV prior to the date of the entry into force of UPOV 1991 were allowed to adhere to UPOV 1978.

[FN80]. Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options 54 (Zed Books Ltd. 2000) (citing Brazilian Patent Law Article 10.1X, Law 9,279 (1996)).

[FN81]. For a possible reading on this issue, see Charles R. McManis, Patenting Genetic Products and Processes: A TRIPS Perspective, in Perspectives on Properties of the Human Genome Project 79, 87-95 (F. Scott Kieff, ed., Elsevier Academic Press 2003).

[FN82]. See FAO Treaty, supra note 56.

[FN83]. See Cary Fowler, Accessing Genetic Resources: International Law Establishes Multilateral System, 51 Genetic Res. & Crop Evolution 609, 609 (2004).

[FN84]. FAO Treaty, supra note 56, preamble, arts. 1.1, 9.

[FN85]. See Consultative Group on International Agricultural Research, http://www.cgiar.org (last visited Jan. 15, 2008).

[FN86]. See Stephen B. Brush, Protecting Traditional Agricultural Knowledge, 17 Wash. U. J.L. & Pol'y 59, 81-83 (2005).

[FN87]. See FAO Treaty, supra note 56, art. 12.3(d).

[FN88]. Id. art. 9.1-9.2. The concept of "Farmers' Rights" was originally embraced in a 1989 FAO resolution, appended as an annex to the FAO's 1983 International Undertaking on Plant Genetic Resources. International Undertaking on Plant Genetic Resources, Annex II Resolution 5/89: Farmers' Rights, available at ftp://ftp.fao.org/ag/cgrfa/iu/iutextE.pdf (last visited Jan. 15, 2008). The concept of "Farmers' Rights" represented a political reaction to another FAO resolution, also appended as an annex to the Undertaking, that first purported to recognize plant genetic resources as a "common heritage" of mankind to be preserved, and to be "freely available" for use, for the benefit of present and future generations, but then acknowledged that plant breeders' rights, as provided for by UPOV, FAO Treaty, supra note 56, were not incompatible with the Undertaking. International Undertaking on Plant Genetic Resources, Annex I Resolution 4/89: Agreed Interpretation of the International Undertaking. The concept of "Farmers' Rights" was thus apparently conceived of as an analogous and offsetting affirmative legal right that farmers should be able to assert against plant breeders, just as plant breeders could assert the sui generis plant breeder's right against farmers (subject, of course, to any "farmers' privilege" recognized in the relevant plant variety protection legislation). Article 9.2 of the FAO Treaty, however, merely states that the responsibility for realizing Farmers' Rights "rests with national governments." FAO Treaty, supra note 56, art. 9. For a detailed discussion of Farmers' Rights, see Brush, supra note 86, at 85-93.

[FN89]. FAO Treaty, supra note 56, art. 9.3 ("Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and

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as appropriate."). For members of UPOV, however, this farmer's privilege must be spelled out in the member's plant variety protection legislation as a limit on the sui generis plant breeders' right. Article 15(2) of UPOV 1991 makes clear that recognition of a farmer's privilege is optional, not mandatory, and that any such privilege is to be limited to permitting farmers to use for propagating purposes, on their own holdings, the product of the harvest they obtain by planting a protected variety or an essentially derived version thereof on their own holdings. UPOV Convention, supra note 78, art. 15(2). This privilege is substantially narrower than the privilege alluded to in Article 9.3 of the FAO Treaty.

[FN90]. TRIPS Agreement, supra note 7, art. 27.3(b).

[FN91]. FAO Treaty, supra note 56, art. 12.1(d).

[FN92]. Id. arts. 12.4, 13.2(d)(ii).

[FN93]. See UNCTAD E-Commerce Report, supra note 55, at 100, which distinguishes between "open-source" software and software distributed under the "copyleft" terms of the GNU General Public License, which requires any redistribution of GPL software to be released only under the GPL to prevent the "closing" of the code and deter its use in a proprietary commercial development environment.

[FN94]. For a discussion of how Farmers' Rights have been implemented at the national level, see Brush, supra note 86, at 93-98.

[FN95]. Article 13.2(d)(ii) of the FAO Treaty specifies that the "Governing Body shall, at its first meeting, determine the level, form and manner of payment" of any monetary benefits, "in line with commercial practice." The first meeting of the Governing Body took place on June 12-16, 2006. For the draft provisional agenda and other documents for this meeting, see Documents of the First Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, June 12-16, 2006, http://www.fao.org/ag/cgrfa/gb1.htm (last visited Jan. 15, 2008).

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***891** SIGHT, SOUND, AND MEANING: TEACHING INTELLECTUAL PROPERTY WITH AUDIOVISUAL MATERIALS

Rebecca Tushnet [FNa1]

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Introduction

When I began teaching copyright and trademark, computer projectors had been newly installed in many of the classrooms at NYU's law school. It seemed obvious that students would often benefit from seeing, hearing, or watching the subjects of the cases we studied, so I began putting together a few images and sound clips. Many of my colleagues had collections of their own, developed over years, often projected on overhead or slide projectors or played from tape or CD players. These examples benefited the students in those classes, but in the digital age, we can do better.

With generous backing from the dean at Georgetown, where I now teach, along with programming assistance from Georgetown's staff, I created the Georgetown IP Teaching Resources Database. [FN1] The basic idea is that professors should have instant access to materials to supplement any intellectual property course. [FN2] These materials allow students to see the subject matter of the cases rather than just reading verbal descriptions and enable them to apply the principles they read about to new, concrete examples. Many students in IP courses have special interests in music, film, or the visual arts, and the database allows me--and other teachers--to present materials that engage them. I have found that students are more willing to speak up in class when they can see or hear for themselves and can point to specific aspects of the underlying materials.

***892** This piece addresses my experience using audiovisual materials in class, focusing on specific examples in which students reacted to what they saw and heard. [FN3] I also briefly address the copyright question: should teachers worry about using digital materials in class? Fortunately, the available statutory exceptions are supportive of in-class teaching. Using images and sounds to illustrate litigated cases and hypotheticals is pedagogically valuable and legally justified.

I. How Do Audiovisual Examples Affect Teaching?

Students generally enjoy the audiovisual materials, at least as a welcome change of pace from the texts that necessarily dominate other subjects. But I think their value is deeper than that. As the Supreme Court has recently recognized, [FN4] the ability to evaluate the evidence itself, rather than just reading a description of it, can be vital in forming a considered judgment in a case. [FN5] Much of the current writing on the pedagogical benefits of audiovisual materials in legal teaching concerns ways to present visually (or audibly) material that could be written out, such as a diagram of the legal relationships of parties in a case. Presenting material in multiple ways is a good idea, but I am more concerned with audiovisual materials as the subject of analysis--audiovisual materials that were involved in litigation, or that students can use to practice applying the legal principles we are studying. I offer here a few examples from copyright, trademark, and the right of publicity, with a brief comment on patents.

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***893** A. Copyright

Audiovisual materials are useful for teaching about the basic subject matter of copyright and the scope of protection. For example, the classic Alfred Bell [FN6] case, concerning the copyrightability of mezzotints based on public domain works, is easier to understand when students can see that different mezzotint artists working from the same painting produce noticeably different results.

Compilations and the fact/expression distinction are often challenging for students. I have had some success with using the periodic table as an example of a compilation of facts and asking students whether the arrangement is protectable, or whether the arrangement itself should be considered factual and uncreative. Students are often unaware that there are multiple ways to represent the periodic table, and showing them several different versions can spur interesting comments, especially from students with a scientific background. [FN7]

Last semester, I explored merger and the idea/expression distinction by discussing Herbert Rosenthal Jewelry Corp. v. Kalpakian, a case holding that defendants did not infringe by copying the idea of a jeweled bee pin because the idea of a jeweled bee pin and its expression were inseparable. [FN8] After I described the case, I showed the class dozens of different jeweled bee pins, some of which look almost nothing like the other pins. I argued that the problem in Kalpakian was not simply merger of idea and expression, but that the plaintiff defined its rights too broadly, contending that any jeweled bee pin would be substantially similar to its pin. [FN9] As a result, the court rejected its claim in equally broad terms. [FN10] This helped students see the different ways that merger works in practice.

Relatedly, I showed five different editorial cartoons that ran the day after Christopher Reeve's death. Each depicts Superman (Reeve's best-known role) rising heavenwards from an abandoned wheelchair. [FN11] The timing of publication makes independent creation extremely likely, yet the expression ***894** might be considered substantially similar. I used this to show how similarity in idea can produce similarity in expression without copying.

Images and sounds are especially valuable for teaching the substantial similarity inquiry in infringement. Words on a page are essentially useless for describing the similarities and differences between nontextual works. If the similarities are visual, they need to be seen; if they are aural, they need to be heard. Copyright casebooks usually try to include some relevant pictures, but they never have everything, and the expense of color printing means that any pictures are black and white, which eliminates crucial details.

The text I use, Copyright in a Global Information Economy, [FN12] for example, uses five recent cases to expand on the classic formulations of the substantial similarity inquiry. [FN13] The works in three of those cases are visual (a poster, alphabet quilts, and a children's book). [FN14] Unfortunately, however, the casebook had pictures only for the first case. [FN15] I collected color images of the poster and similar pictures, found a picture of one of the quilts, ordered the allegedly infringing children's book, and contacted the plaintiff's lawyer for images of the allegedly infringed book. I was then able to show the pictures in class, and students made their own judgments about substantial similarity and compared their reasoning to the courts'. [FN16] The pictures on the following pages are from the children's book case. [FN17] They were not shown in the court's opinion or in the casebook, but seeing them gives some sense of the facts the parties' lawyers and the courts actually had to evaluate. (In my class, I show them in color).

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***895** A page of plaintiff's book in Cavalier v. Random House.

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TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
An allegedly infringing page of defendant's book.

Likewise, using Columbia Law Library's Music Plagiarism archive, [FN18] students can listen to samples of music involved in infringement cases, ***896** including the works involved in the casebook's fifth recent case. [FN19] In fact, for some cases, the Music Plagiarism archive makes available samples of accused and accusing songs, samples of their melodic lines alone, and sheet music. [FN20] Comparing these, students can get a sense of which ways of presenting the evidence best support the plaintiff's argument and which best support the defendant's. [FN21]

Another of the cases, Steinberg v. Columbia Pictures Industries, Inc., [FN22] deserves extended discussion. Steinberg involved the famous New Yorker cover showing a New Yorker's myopic vision of the world, in which New York looms largest and only a few other national and world landmarks are worthy of note. [FN23] The artist, Steinberg, sold many copies of a poster reproducing the cover. [FN24] A district court found that the poster for the film Moscow on the Hudson infringed Steinberg's copyright. [FN25] The last time I taught the case, I showed the class the original New Yorker cover and the Moscow on the Hudson poster. Then I showed a number of other "myopic vision of the world" pictures, clearly inspired by Steinberg's work. Most of them depict cities other than New York; some are closer to Steinberg's style than others.

The result of showing this extensive series of images surprised me. At the beginning of the discussion, most of the students agreed with the judge in Steinberg that the movie poster was substantially similar to the New Yorker cover. After we had looked at so many other "myopic vision" images, however, many changed their minds. They now saw the shared features of the pictures as an unprotectable style, not protectable expression. Reasonable people can disagree over the result in Steinberg, of course, but what is striking is that the images themselves affected how students thought about the problem.

Images can have persuasive power in other contexts. Roberta Rosenthal Kwall suggests that the court in Carter v. Helmsley-Spear, Inc. [FN26] may have determined that the installation at issue was a work for hire, and thus not ***897** protected against destruction by the Visual Artists Rights Act, [FN27] "because it was troubled by the prospect of allowing the work to remain in a lobby for a long period of time when the original agreement was entered into by a net lessee of the building, rather than by the building's owner." [FN28] That's very plausible, but let me suggest an additional consideration: the installation was hideously ugly. It may have had artistic merit, like a Francis Bacon painting, but that doesn't mean any reasonable hotel or office building management would want it dominating ("eating" might be a better word) the lobby. The persuasive force of my argument is, I think, much enhanced by the pictures I copied from my former NYU colleague, Diane Lenheer Zimmerman. Showing them in class is the best way to make my point.

B. Trademark

Audiovisual materials are extremely helpful in trademark classes as well. Students have strong feelings about whether an unauthorized poster of the Rock and Roll Hall of Fame should be deemed infringing, [FN29] or whether the Baltimore CFL Colts infringed on the trademark of the Indianapolis (formerly Baltimore) Colts, [FN30] and pictures of the merchandise at issue in those cases give them ammunition for their arguments. I also pass around a can of the novelty energy drink Cocaine, allowing students to examine it and evaluate whether the mark COCAINE for a beverage is scandalous or, as some suggest, treading too close to Coca-Cola's rights.

I have found audiovisual materials particularly useful in teaching aspects of trademark that are less intuitive,

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such as the meaning of using a symbol "as a mark." Sonicare's alleged whirlpool mark for its toothbrushes, which appears on Sonicare boxes only behind a picture of the toothbrush, demonstrates that an image may appear on a product without serving as a source identifier for that product. [FN31] I also enjoy showing students examples that straddle the border between descriptive fair use and use as a mark, such as a photo I took of a PBS ad for the reality series Colonial House. As part of an advertising theme that life in the Seventeenth Century was very different from modern life, this ad shows a large picture of a single blackberry fruit, with the caption "Blackberry, 1628." The reference to the BlackBerry PDA is obvious in context, but is it descriptive or nominative, or something else?

***898** I introduce the concept of trademark dilution with a classic definition, the "whittling away" of the value of a mark through non-confusing use on multiple products. [FN32] Then I switch to a term used by a slightly confused student on an exam some years ago: the "widdling away" of a trademark. Combined with a picture of a rather crass auto decal--Calvin of Calvin & Hobbes urinating on the Dodge logo--students get an indelible image of dilution, or at least of tarnishment.

I am no fan of dilution law, particularly blurring, which I think is a theory without a justification. [FN33] Nonetheless, it is part of the law, and many people have an intuition that there is something to the idea of dilution. Thus, I show students an example of dilution in action. I start with the iTunes advertising trade dress, which is a white silhouette against a colorful background. I then show dozens of examples of unauthorized use of the trade dress, from a New Yorker magazine cover about doctors to a Mad Magazine parody, with stops along the way at political posters about the war in Iraq, modified Lego men holding tiny iPods, ipodmyphoto.com, and numerous other unrelated uses. I hope to demonstrate to students why trademark owners care about dilution, even if the harm is very hard to articulate and even if one individual unauthorized use seems unlikely to do any harm to the trademark owner.

Finally, for keeping students engaged, nothing beats the two Battletanx ads starring a brutalized Snuggle bear; I explain to students that the first one was enjoined, [FN34] but that the defendant still produced the second one because the concept was just that good.

C. The Right of Publicity

My best experience with teaching publicity rights came from showing a website that sells outfits and accessories just like those worn by celebrities and advertises using pictures of those celebrities wearing the items. [FN35] The class recognized pictures of Paris Hilton and other currently famous people and had a vigorous discussion about the acceptability of using such pictures for commercial purposes without authorization. Many younger students are unfamiliar with figures such as Woody Allen and Bette Midler, whose legal battles set the basic ground rules for the right of publicity. [FN36] Scenarios ***899** involving current stars kept students' attention and allowed them to use their background knowledge of the role of celebrity in modern culture.

In my coverage of the right of publicity, the limits on the right as applied to artistic works loom large. I frame the issue in terms of the Second Circuit's artistic relevance test for works that are not subject to Lanham Act or right of publicity liability [FN37] versus the California Supreme Court's transformative use test. The latter was set forth in Comedy III Productions, Inc. v. Gary Saderup, Inc., [FN38] which found that artist Gary Saderup's lithographs of the Three Stooges violated the Stooges' right of publicity. [FN39] I discuss Saderup's "Andy Warhol exception," the court's implicit concession that Andy Warhol's lithographs are valuable commentary on fame because Warhol was himself famous, rather than because Warhol transformed the celebrity images

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he depicted. [FN40] I show Saderup's Stooges picture, then Warhol's Marilyn Monroe, and ask what the difference is between them. Invariably, a student points out that Saderup's charcoal drawing is naturalistic, whereas Warhol's version has color and is more abstract. I then show them Saderup's Stooges drawing "Warholized" using Photoshop, [FN41] and ask them if Saderup would win the case if he had done the same thing. Students don't agree on the right answer, but it's an entertaining example that allows them to sharpen their thinking about the proper limits on publicity rights.

Encouraging students to think in concrete terms about the specific materials in front of them, and the different media in which they're delivered, often produces new insights: one student pointed out that our intuitions about artistic relevance, and thus the appropriate outcome in right of publicity cases, are highly medium-dependent. She offered the example of a painting of a sunflower. If the artist called the painting Rosa Parks, most of us would be willing to construct a story linking the title to the subject matter in order to allow the artist to use that title without permission. With the song Rosa Parks, by contrast, a court of appeals was willing to parse the lyrics for explicit artistic relevance, rather than deferring to the artists' choice of allusion. [FN42]

D. Patent

I do not currently teach patent law, but I have it on good authority that images are important so that students can see the often significant divergences between the invention as disclosed in the drawings and the scope of the claims. ***900** In the future, I hope to add more patent-related material to the database, including animations prepared for litigation in patent cases which can educate them both in the subject matter and in practice considerations.

Using materials prepared for litigation is helpful because practicing intellectual property lawyers are far ahead of professors in using audiovisual materials for demonstrative purposes. Actual exhibits are a preview of what students will encounter once they leave law school. Moreover, students who are intimidated by the technical reputation of patent law are often reassured by reminders that patent litigation is about explaining specialized subject matter to non-specialist judges and jurors.

E. Concerns

There are some dangers of relying heavily on audiovisual materials, even setting aside occasional technological glitches. Students come to expect that every case will be illustrated. When we were discussing an important case finding that putting the name of a sports event on a T-shirt creates a presumption of infringement, [FN43] one student commented that she would have had a much easier time reaching a conclusion about the result if she could have seen the T-shirts themselves. (Given the age of the case, I had relied on pictures of official T-shirts, but had been unable to find any trace of the defendant's T-shirts.) It is a truism in teaching that one bad moment erases dozens of good ones before, but I had never felt that so keenly before.

Another, more significant issue is differences among students. Foreign students, for example, often have very different cultural backgrounds. When the subject matter of my examples is popular in the United States, I have to make sure that other students who might be unfamiliar with the referent can still follow along. [FN44] Students whose native language is not English can also have difficulty hearing the lyrics of songs, so when they are relevant it is important to provide written lyrics.

Varying physical capacities also pose potential challenges. [FN45] As far as I know, I have not yet taught students who were entirely unable to see or hear, but I have dealt with a colorblind student. It was not a problem

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in class, but ***901** because my exams also rely extensively on pictures, I had to ensure that nothing on the exam turned on the ability to distinguish colors.

A final problem concerns class recording. Currently, at Georgetown, classes are recorded only in audio, rather than in video. As a result, a student who downloads the audio recording to catch up with a missed class, or even to reinforce material from a class she attended, is unable to see the images I displayed in the actual class. [FN46] I hope that the visual component of the class will ultimately be recorded. Ideally, I would like to record the screen and synchronize that with the audio. For now, I will give students access to the PowerPoint presentations associated with a class when they need it to understand the audio recording.

II. Copyright Issues

The Copyright Act allows professors to engage in:

> performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made. [FN47] (The Technology Education and Copyright Harmonization Act (TEACH Act) also allows similar uses for teaching over the internet though its requirements are complicated and somewhat unclear.) [FN48]

Section 110(1)'s wording, designed to give special protections to audiovisual works, suggests that teachers can use the protections of §110(1) in ***902** most cases, even to show excerpts of films that infringe pictorial or sculptural works. [FN49] Nonetheless, some cases I teach involve infringement of an audiovisual work. [FN50] In those cases, the infringing work was not "lawfully made," and showing it requires reliance on fair use. Fortunately, I am confident that fair use applies to such educational uses. Related questions include whether making an excerpt of a film is fair use, such that the excerpt is "lawfully made." [FN51] In fact, because the §110(1) exception does not cover reproduction and because courts have consistently found that RAM copies made automatically in a computer's memory implicate the reproduction right, [FN52] it may be necessary in many cases to engage in a fair use analysis when the classroom copy comes from a computer projection.

Unsurprisingly, I believe that classroom use of unauthorized copies of works in order to discuss intellectual property issues raised by those specific works is fair use. [FN53] Crucially, the use is nonprofit and educational, and thus resides firmly within the core set of socially beneficial activities that have traditionally been considered fair uses. Moreover, the use is transformative, recontextualizing the works and giving them new meaning. We study Steinberg's poster to understand the concept of substantial similarity, not to benefit from its aesthetic and entertaining qualities. [FN54]

***903** The nature of the works varies, though they are often creative and almost always published. [FN55] Where it is possible to use only excerpts, as with most of the musical and video examples, I do so. With pictures, by contrast, it is often vital to show the entire picture in order to make the issue intelligible; a corner of Steinberg's poster would not suffice. Recent fair use cases have recognized that, in such instances, reproduction of the entire work does not cut against fair use. [FN56] Evaluating the effect on the market requires a murky, often circular, inquiry, but in general the market value of the materials I use is minimal. In fact, lawyers for parties to litigation often send me their pictures at my request, without asking for compensation. On balance, the transformative and nonprofit nature of the use outweighs any other considerations.

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In some ways, this exercise in fair use analysis is silly. It is unlikely that any copyright owner is going to protest. Moreover, I may be giving too much legitimacy to what sensible people should recognize as extreme copyright claims. Jessica Litman has recently criticized copyright scholars' tendency to treat copyright owners' control as so pervasive that every unauthorized use requires careful justification. [FN57] Instead, she argues, we should look beyond restrictive, overly literal interpretations of the Copyright Act and recognize substantial scope for uncontrolled, unauthorized uses. [FN58] Nonetheless, it would be difficult to write an article about teaching intellectual property with audiovisual materials without at least mentioning the copyright implications. Regardless of whether we should argue about fair use so often, we routinely do.

Conclusion

Keeping an eye out for picture-taking opportunities has enriched my daily life. For example, as I was walking from my hotel to a conference at the Loyola Law School in Los Angeles, I saw a building that looked oddly familiar. As I approached, I realized that it was the 801 Tower, which sits at the southwest corner of Figueroa and Eighth Streets. The courtyard and the streetwall attached to the building's façade comprise Zanja Madre, a sculptural installation by Andrew Leicester. [FN59] The movie Batman Forever shows Zanja Madre for several seconds when the 801 Tower plays the role of the Second Bank of Gotham. [FN60] This brief display triggered a lawsuit that resulted in an ***904** important ruling on the line between copyright protection for architectural works and copyright protection for sculpture. [FN61] The pictures I took that day were bad, but the thrill of stumbling upon the subject of a case was delightful.

Less delightful was getting kicked out of a Walgreen's. I had been taking pictures of house brands with trade dress that imitated the trade dress of the competing national brands. Apparently the manager of the store was concerned that I was up to no good.

In general, however, people have been very helpful with my odd preoccupation. Many lawyers have provided me with useful materials. I have found that approaching the lawyers for the prevailing party in an interesting intellectual property case is often the most productive tactic, because the winning lawyers are most likely to want to share both their pictures and their war stories with me. Litigants themselves, by contrast, are often still smarting from the lawsuit--even when they are formally the victors--and can find it difficult to revisit the case.

Searching for useful audiovisual materials keeps me engaged with my teaching areas every day. There is always another picture to consider, another celebrity whose name is borrowed for a song title. [FN62] I doubt my students consider me entirely culturally up to date, but I am confident that my courses are better because I routinely revisit my examples, looking for materials that draw on students' existing competences in analyzing images and sounds.

The judicial opinions and the casebooks we use to teach only occasionally show the works they discuss, and legal scholarship in intellectual property almost never does. Our students, however, should be familiar with the increasing use of pictures, video, and audio in law practice. Although those of us who teach intellectual property are particularly well-positioned to take advantage of audiovisual materials in the classroom because of our subject matter, our students will be using such materials no matter what type of law they practice. Law professors should consider whether going beyond the blackboard offers them the advantages it provides in other types of teaching and in legal practice. My experience has been overwhelmingly positive, and I encourage others to experiment with the materials in the Georgetown IP Teaching Resources Database to see what works best for them.

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[FNa1]. Professor, Georgetown University Law Center. Thanks to Michael Madison for sharing his expertise, Mark Tushnet for his comments, and especially to Zachary Schrag for teaching me about the importance of non-textual evidence.

[FN1]. I am grateful for the professional and dedicated job Juan González de Escalada has done in programming the database, helping me configure it for best use, and solving technical problems as they arise.

[FN2]. Access to the database is available to any person teaching an intellectual property course at an accredited law school, or otherwise making educational uses of the materials. Anyone interested in receiving the username and password should contact me at rlt26@law.georgetown.edu.

[FN3]. Other articles have addressed the use of audiovisual materials in legal education generally. See, e.g., Fred Galves, Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom, 2004 U. Ill. J.L. Tech. & Pol'y 195 (2004); Vincent Robert Johnson, Audiovisual Enhancement of Classroom Teaching: A Primer for Law Professors, 37 J. Legal Educ. 97 (1987).

[FN4]. See Scott v. Harris, 127 S. Ct. 1769, 1775-76 & n.5 (2007) (referring to video of a car chase posted at the Supreme Court's website in order to bolster the majority's conclusions about the reasonability of the police actions at issue).

[FN5]. See, e.g., James Eagar, Comment, The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education, 32 Gonz. L. Rev. 389, 410-11 (1997); Galves, supra note 3, at 202-03; Johnson, supra note 3, at 102; see also M.H. Sam Jacobson, A Primer on Learning Styles: Reaching Every Student, 25 Seattle U. L. Rev. 139, 151-52 (2001) (suggesting that visual learners may have difficulty with other standard law school teaching methods, so visual aids may be particularly helpful for them).

[FN6]. Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

[FN7]. Michael Madison, similarly, uses different versions of the periodic table, including Tom Lehrer's excellent song The Elements, to teach merger.

[FN8]. 446 F.2d 738, 742 (9th Cir. 1971).

[FN9]. See id. at 740.

[FN10]. See id.

[FN11]. See Daryl Cagle's Professional Cartoonists Index, http:// cagle.msnbc.com/ChristopherReeve/2.asp (cartoons by Bob Englehart and Jeff Koterba) (last visited Nov. 9, 1007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/7.asp (cartoon by Cal Grondahl) (last visisted Nov. 9, 2007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/main.asp (cartoon by Vic Harville) (last visited Nov. 9, 2007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/6.asp (cartoon by Steve Nease) (last visited Nov. 9, 2007).

[FN12]. Julie E. Cohen et al., Copyright in a Global Information Economy (2d ed. 2006).

[FN13]. The cases are Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987); Boisson v. Banian, Ltd., 273 F.3d 262 (2d Cir. 2001); Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir.

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1992); Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004); and Cavalier v. Random House, Inc., 297 F.3d 815 (9th Cir. 2002).

[FN14]. Cavalier, 297 F.3d at 819 (children's book); Boisson, 273 F.3d at 265-66 (alphabet quilts); Steinberg, 663 F. Supp. at 708-09 (poster).

[FN15]. See Cohen, supra note 12, at 338-39 (showing pictures of the works at issue in Steinberg, 663 F. Supp. at 708-09).

[FN16]. Cf. Galves, supra note 3, at 214 ("[T]he class can better follow the particular issue being discussed, since they can refer to the pending issue on the screen as they wrestle with the substantive legal issue at hand. Class discussion is more organized and focused than it is without visual displays because verbal misunderstandings of facts, hypotheticals, and key language are minimized.").

[FN17]. See Cavalier, 297 F.3d 815.

[FN18]. See Columbia Law School Music Plagiarism Project, http:// ccnmtl.columbia.edu/projects/law/library/entrance.html (last visited Nov. 9, 2007).

[FN19]. See Swirsky v. Carey, 376 F.3d 841, http:// ccnmtl.columbia.edu/projects/law/library/cases/case_swirskycarey.html (last visited Nov. 9, 2007) (providing sound recordings).

[FN20]. See Bright Tunes Music v. Harrisongs Music, 420 F. Supp. 177 (S.D.N.Y. 1976), http://ccnmtl.columbia.edu/projects/law/library/cases/case_ brightharrisongs.html (providing samples of the sound recordings, melodic lines, and partial scores for the works at issue in Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976)) (last visited Nov. 9, 2007).

[FN21]. I thank Laura Heymann for this example.

[FN22]. 663 F. Supp. 706 (S.D.N.Y. 1987).

[FN23]. Id. at 709-10.

[FN24]. Id. at 709.

[FN25]. Id. at 714.

[FN26]. 71 F.3d 77 (2d Cir. 1995).

[FN27]. 17 U.S.C. § 106A (2000).

[FN28]. Roberta Rosenthal Kwall, How Fine Art Fares Post VARA, 1 Marq. Intell. Prop. L. Rev. 1, 9-10 (1997).

[FN29]. See Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions, 134 F.3d 749 (6th Cir. 1998).

[FN30]. See Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship, 34 F.3d 410 (7th Cir. 1994).

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[FN31]. See In re Optiva Corp., 2005 WL 906510, at *2-3 (T.T.A.B. Apr. 5, 2005).

[FN32]. See, e.g., 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24:67, at 24-166; § 24:70, at 24-173 (2007).

[FN33]. See Rebecca Tushnet, Gone in 60 Milliseconds: Trademark Law and Cognitive Science, 86 Tex. L. Rev. (forthcoming 2007), available at http:// www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Tushnet.doc (last visited Nov. 9, 2007).

[FN34]. Conopco Inc. v. 3DO Co., 53 U.S.P.Q.2d 1146, 1147 (S.D.N.Y. 1999).

[FN35]. See ShopRobertson.com, Celebrity Sightings, http:// www.shoprobertson.com/index.php?main_page=page&id=1 (last visited Nov. 9, 2007).

[FN36]. See Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985).

[FN37]. See Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

[FN38]. 21 P.3d 797, 808-10 (Cal. 2001).

[FN39]. Id. at 811.

[FN40]. Id.

[FN41]. See Melissa Clifton, Andy-Warhol-Up Your Photographs, http:// www.melissaclifton.com/tutorial-warholphoto.html (last visited Nov. 9, 2007).

[FN42]. Parks v. LaFace Records, 329 F.3d 437, 452-54 (6th Cir. 2003).

[FN43]. See Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 29 (1st Cir. 1989).

[FN44]. Cf. Galves, supra note 3, at 228 ("[S]tudents [whose native tongue is not English] have observed how much more information they are able to understand and obtain from my lectures given the added use of display technology. They state that they are able to overcome the language barrier much better because the verbal information I present is reinforced by computer images. This should not be surprising because it is easier to understand a foreign language when reading it while listening to it, rather than when merely listening to a native speaker.") (footnote omitted).

[FN45]. Visually impaired students may have difficulty with standard uses of a whiteboard or blackboard as well, but using "pictures worth a thousand words" makes the problem more salient.

[FN46]. Again, this is a problem for any professor who writes on the board as part of teaching a class that is being recorded. Slides improve the situation, by creating a record that can be shared.

[FN47]. 17 U.S.C. § 110(1) (2000).

[FN48]. 17 U.S.C. § 110(2) (Supp. IV 2006) (allowing the online performance of nondramatic literary or musical works, and performance or display of reasonable and limited portions of any other work); see also 17 U.S.C. §

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112(f) (Supp. IV 2006) (allowing reproductions in conjunction with performances or displays authorized under § 110(2), as long as the educational institution does not digitize an analog work unless no digital version is available or the digital version cannot be used because of technological protection measures). The TEACH Act is complicated enough that many institutions, and even more individual educators, are not making use of it. See Kristine H. Hutchinson, Note, The TEACH Act: Copyright Law and Online Education, 78 N.Y.U. L. Rev. 2204, 2231-34 (2003). Several institutions offer useful guides to the Act's provisions. See, e.g., N.C. State Univ., The TEACH Toolkit: An Online Resource for Understanding Copyright and Distance Education, http://www.lib.ncsu.edu/scc/legislative/teachkit/ (last visited Nov. 9, 2007); Office of Legal Affairs, Univ. Sys. of Ga., Guide To The TEACH Act, http://www.usg.edu/legal/copyright/teach_act.phtml (last visited Nov. 9, 2007); Univ. of Tex. Sys., The TEACH Act Finally Becomes Law. http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm (last visited Nov. 9, 2007).

[FN49]. See, e.g., Woods v. Universal City Studios, Inc., 920 F. Supp. 62, 63-65 (S.D.N.Y. 1996) (issuing preliminary injunction against studio when artist claimed the film 12 Monkeys infringed his pencil drawing).

[FN50]. See, e.g., Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) (discussing infringement claims brought by Monty Python authors).

[FN51]. Cf. Library of Congress, Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473-74 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201) (concluding that film and media studies professors may lawfully circumvent access controls on DVDs in order to make excerpts of films for use in class).

[FN52]. See, e.g., MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

[FN53]. I phrase it this way to make clear that I don't contend that copying a random work in class, for example downloading an unauthorized copy of a movie, is fair use, even though the act of downloading could be the focus of a classroom discussion.

[FN54]. See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609-10 (2d Cir. 2006) (using images to document historical events was transformative when the original purpose was expressive and promotional); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818-20 (9th Cir. 2003) (finding fair use where inclusion of pictures in database was unrelated to the aesthetic value of the pictures and the database served a socially valuable purpose); Hofheinz v. A & E Television Networks, Inc., 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001) (use of film clips in biography was fair use because it "was not shown to recreate the creative expression reposing in plaintiff's film, [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business").

[FN55]. See, e.g., Kelly, 336 F.3d at 820 (weighing the creative nature of works only slightly in favor of plaintiff and holding that the scope of fair use is broader for published works).

[FN56]. See, e.g., id. at 820-21; Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 522 (7th Cir. 2002); Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000).

[FN57]. Jessica Litman, Lawful Personal Use, 85 Tex. L. Rev. 1871, 1920 (2007).

[FN58]. Id.

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[FN59]. See Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000).

[FN60]. Id.

[FN61]. See id.

[FN62]. Along with Outkast's Rosa Parks, see Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003), I have used excerpts from Clark Gable (The Postal Service) and Clint Eastwood (Gorillaz) as examples, asking students to analyze whether they violate the celebrities' rights of publicity under the Second Circuit's artistic relevance test and the California Supreme Court's transformative use test. The results are always enlightening.

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***923** TEACHING INTERNATIONAL INTELLECTUAL PROPERTY LAW

Peter K. Yu [FNa1]

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***924** Introduction

Intellectual property law was in the backwater only a few decades ago. The Section on Intellectual Property Law of the Association of American Law Schools (AALS) was not even founded until the early 1980s, [FN1] and the creation of intellectual property specialty programs has been a recent phenomenon. [FN2] As senior legal scholars reminisced, early in their career, they would have been lucky to find a school that would allow them to teach a class on intellectual property law. Even if they were able to do so, that "niche" class might very well have been the only one, and the rest of their teaching duties would have been devoted to other subject areas, such as property, contracts, or commercial law. [FN3]

Although intellectual property law teaching has come of age in the past decade, international intellectual property law courses remain nonexistent in more than half of American law schools. When Roberta Kwall conducted her AALS survey in 1999, only nineteen out of the sixty-nine ABA-accredited law school respondents reported offering a course on international intellectual ***925** property law. [FN4] Her finding is no surprise. The Agreement on Trade-Related Aspects of Intellectual Property Rights [FN5] (TRIPs Agreement) had come into effect only a few years before, and many law

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schools did not offer the course until the mid-to-late 1990s--thanks in no small part to the publication in 1996 of the timely, yet pioneering, international intellectual property law anthology edited by Anthony D'Amato and Doris Long. [FN6]

The momentum has since picked up quickly, however. At the turn of this millennium, four new casebooks appeared on the market. [FN7] According to the latest survey conducted by Kenneth Port, seventy-one American law schools offered a course on international or comparative intellectual property law during 2004-2005, with some schools offering even more than one course. [FN8] In the past two years, two more casebooks arrived, with a third one planned for release in 2008. [FN9] International intellectual property law is, therefore, no longer ***926** considered a "niche" course. It has finally become a staple in the core intellectual property law curriculum.

Taking advantage of the forum provided by this Symposium, this Essay reflects on the teaching of international intellectual property law. Part I identifies three different stages in the development of an international intellectual property law course. Going from the pre-TRIPs era to the post-TRIPs era, this Part shows how the growing complexity of the international intellectual property regime has made teaching the subject increasingly challenging. Part II focuses on this challenge and examines why international intellectual property law is taught in the first place, what materials teachers can cover, and how they can effectively present those materials. By offering both questions and suggestions, this Part invites readers to evaluate and rethink the design of an international intellectual property law course. This Part concludes with some bonus considerations that may be relevant to both teachers and administrators.

I. Three Stages: International, Global, and Global Plus

A. International Intellectual Property Law

Although I was not able to examine materials from any international intellectual property law courses that were offered in the pre-TRIPs era, or ascertain whether or in what form those courses existed and how frequently they were taught, international intellectual property law was widely studied. Some casebooks and treatises on intellectual property law published in that period included a section, usually the last one, on international developments. [FN10] There were also lengthy treatises on international intellectual property law--most notably, the two classic treatises Stephen Ladas published in the 1930s. [FN11]

Thus, if an international intellectual property law course were to be conceived in the pre-TRIPs environment, half of it would be likely to cover international and regional developments. The Paris and Berne Conventions [FN12] are the cornerstones of the international intellectual property regime. ***927** Established in the 1880s, these two treaties and their multiple revision texts would certainly dominate the list of instructional materials in the pre-TRIPs era. The Rome Convention, [FN13] which offers protection to performers, phonogram producers, and broadcasters, would also be likely to make the list, although that convention admittedly would receive significantly less attention due to the lack of a neighboring rights regime in the United States. In addition, the course materials would be likely to include the Madrid Agreement Concerning the International Registration of Marks, [FN14] the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, [FN15] the Patent Cooperation Treaty (PCT), [FN16] the European Patent Convention (EPC), [FN17] as well as other related international and regional treaties and institutions.

Those who were interested in developments in the European Economic Community would also cover the Treaty of Rome [FN18] and other community-wide developments, such as the then-proposed (and now-established) Community Trade Mark System, the ongoing efforts to "approximate" trademark laws within the Community, and the origin and special nature of the Benelux Trade Mark Office. [FN19] Such materials would provide fascinating classroom discussion, because they concerned not only the scope and feasibility of regional harmonization, but also the expediency of develop-

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ing a "supranational code." [FN20] Although we now take for granted the existence of the European Union and its many region-wide directives and regulations, these institutions and legislative efforts began as mere experiments. Even today, the Community Patent System, which dates back to the 1960s, has yet to be adopted. [FN21]

***928** The other half of the course would likely be devoted to transnational and comparative law. It would cover the protection of U.S. rights holders abroad and their foreign counterparts within the United States. Some of the practice-oriented issues taught in the course would include the mechanics and procedural requirements of the Madrid system, the EPC, and the PCT. It would also be important for students to understand the applicable laws in transnational disputes between multinational parties, related jurisdictional issues, the limitation in the extraterritorial application of U.S. laws, and the cross-border recognition and enforcement of judgments.

When foreign laws were studied, they were usually taught to show their similarities to and differences from U.S. laws. Why were the two bodies of law different? Should foreign laws be harmonized with those of the United States? Should the latter be amended instead to harmonize with the former? Even today, it remains of great interest--not just in a historical sense--to study how U.S. intellectual property laws differ from those of other countries in their origin, substance, and procedure. It is also interesting to show how the United States has gradually turned around from being a pirating nation in both the copyright and patent contexts to assuming the role of the worldwide champion and chief enforcer of intellectual property rights. [FN22] In sum, virtually all of the classroom discussion would focus on comparative, international, and transnational intellectual property law.

B. Global Intellectual Property Law

This comparative-international-transnational approach was challenged in the mid-1990s by the rude arrival of the TRIPs Agreement and the emergence of new technologies, like biotechnology, the Internet, and other forms of digital communications technologies. Many, indeed, consider the TRIPs Agreement a "sea change" or a "tectonic shift" in international intellectual property law. [FN23]

The Agreement brought to the field at least four significant changes. First, the Agreement married intellectual property with international trade and established a mandatory dispute settlement process. [FN24] In response to this change, teachers now have to cover both the international trade and public ***929** international law aspects of intellectual property rights. They have to explain not only the processes and institutions through which international treaties were created and implemented, but also how treaties were to be interpreted--under, say, the Vienna Convention on the Law of Treaties. [FN25]

Until then, many of the concepts and interpretive tools commonly taught in public international law--such as the lex prior principle, [FN26] the last in time rule (or the lex posterior principle), [FN27] the lex specialis interpretive rule, [FN28] the non-self-executing nature of many international treaties, [FN29] and theories of state succession [FN30]--were rarely covered in an international intellectual property law ***930** course. Instead, international intellectual property law was generally considered a private international law subject. As Paul Geller explained:

> The Berne Convention is above all an instrument of private international law, assuring private parties of rights in literary and artistic works. To have effect, these rights must be vindicated in national courts, to which private parties may have recourse in copyright disputes with other private parties. The GATT, by contrast, is essentially an instrument of public international law: it governs disputes between public entities, notably nation-states, and has procedures to adjudicate such disputes and to sanction states for violating its rules. [FN31] To reflect the increasing emphasis on public international law and the gradual shift of focus away from private international law, teachers have to modify their course by including materials on the interactions among state-to-state relations, government policies,

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and private enforcement of intellectual property rights. [FN32]

Those interested in the legislative process, the public choice theory, and interest group politics may also include a more in-depth discussion of the international harmonization process. Although harmonization is usually considered a "two-way street" that affects parties on both sides, the process initiated by the TRIPs negotiations and induced by the United States' Section 301 actions was largely a "one-way street." [FN33] Because the TRIPs Agreement transplanted laws from developed to less developed countries, [FN34] it has raised difficult issues concerning cultural studies, development theories, transnational jurisprudence, and social justice.

Second, the TRIPs Agreement provided an opportunity for the teaching of other basic forms of intellectual property rights that are rarely covered in a domestic course. Most of the existing introductory courses tend to focus on the four major forms of intellectual property--copyrights, patents, trademarks, and trade secrets. By contrast, the Agreement covers five additional forms of ***931** protection--geographical indications, industrial designs, plant variety protection, layout designs of integrated circuits, and the protection of undisclosed information (a form of protection that includes both trade secrets and other forms of undisclosed information). [FN35] In fact, after teaching all eight forms of intellectual property rights covered by the TRIPs Agreement, one has to wonder whether the basic domestic intellectual property survey course needs to be revamped to reflect the multiple areas of protection covered by today's increasingly complex intellectual property system.

Third, the TRIPs Agreement introduced to all WTO member states many uniform minimum standards on which there was no international consensus before. Article 10(1), for example, states that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention." [FN36] Article 23 offers special protection to geographical indications for wines and spirits. [FN37] Article 27(1) stipulates that "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced." [FN38] Article 27(3)(b) requires each member state to "provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof." [FN39] Article 31 delineates the conditions under which a country can issue a compulsory license. [FN40] Article 35 offers protection to integrated circuit topographies through a reference to the Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits. [FN41] Article 39(3) mandates protection against the unfair commercial use of clinical trial data that have been submitted to regulatory agencies for the approval of pharmaceutical or agricultural chemical products that utilize new chemical entities. [FN42]

Because of the mandatory nature of these minimum standards, as well as the wide acceptance of other optional standards, the international intellectual property system has become tidier, and teaching the course has become easier and more efficient. In the past, teachers had to focus on the laws and customs of many different countries--say Britain, France, and Germany. With the adoption of the TRIPs Agreement, they can now focus on the "harmonized" laws of the WTO community. The arrival of the TRIPs Agreement therefore ***932** allows teachers to use pedagogical approaches that are commonly reserved for domestic intellectual property law courses. Teaching the TRIPs Agreement as the international framework also better reflects the international intellectual property landscape. Except for the few rich and powerful developed countries, most countries, to the dismay of commentators, have used the Agreement as a universal template for modernizing their intellectual property systems. [FN43]

Finally, and very importantly, the TRIPs Agreement transformed the international intellectual property system from an international framework to a global one. [FN44] Traditionally, treaties within the international intellectual property regime, such as the Berne, Paris, and Rome Conventions, were largely introduced to patch up the divergent protections offered in various national systems. Countries, as a result, retained wide autonomy and policy space to develop their own

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intellectual property systems. The TRIPs Agreement, however, altered that arrangement--so dramatically that a supranational code is now super-imposed on the weaker, if not all, WTO member states. [FN45] Because this code is insensitive to their local needs, national interests, technological capabilities, institutional capacities, and public health conditions, many less developed countries suffer economically and are confronted with massive domestic problems, such as the widely reported public health crises concerning HIV/AIDS, tuberculosis, malaria, and other epidemics.

As a result, teachers may want to focus on not only the minimum standards (the protection floor), but also the maximum standards (the protection ceiling). Such a focus would be similar to the one they have when they teach the domestic course. For example, in addition to the minimum standards, they may want to emphasize the eligibility requirements for the different forms of intellectual property protection; the nonprotection of ideas, procedures, ***933** methods of operation, and mathematical concepts in copyright law; the availability of compulsory licensing of patented pharmaceuticals; unrestricted use of generic terms notwithstanding the protection of trademarks; the importance of technical and functional considerations in laws involving trade dresses and industrial designs; permissive limitations and exceptions under the three-step test; remedies for anticompetitive practices; and special exemptions that seek to respond to national exigencies.

Although the TRIPs Agreement has had a significant impact on the international intellectual property law course, the course has also been heavily impacted by rapid technological change, some of which occurred before or during the TRIPs negotiations. The biotechnology revolution, for example, has proceeded very rapidly since the 1980s--partly as a result of the United States Supreme Court case of Diamond v. Chakrabarty. [FN46] That revolution not only has resulted in the creation of new protectable subject matters, but has also sparked many novel ethical debates and controversies. [FN47] Fortunately for the public interest, the drafters of the TRIPs Agreement took into consideration some of these controversies and included special provisions and safeguards to alleviate some of the related concerns.

For instance, article 27(2) allows each WTO member state to "exclude from patentability inventions, the prevention . . . of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment." [FN48] This provision echoes article 53(a) of the EPC, which excludes from protection those inventions "the publication or exploitation of which would be contrary to ordre public or morality." [FN49] Article 27(3)(b) also permits each member to exclude from patentability "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes." [FN50]

The drafters, however, did not anticipate all of the latest technological changes. A good example of these unanticipated changes concerns the technological change brought about by the information revolution. Indeed, the ***934** advent of the Internet and new communications technologies rendered the TRIPs Agreement obsolete even before it entered into effect. As Marci Hamilton aptly observed:

> Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line. [FN51] As a result, policymakers in technology-rich countries, such as the United States and members of the European Community, had to scramble for solutions to respond to challenges brought about by these new technologies. As the international community struggled to update the international intellectual property regime, the 1996 World Intellectual Property Organization (WIPO) Internet Treaties were promulgated. [FN52] New forms of protection, such as sui generis database protection [FN53] and those offered by the EC Information Society Directive, [FN54] also found their way into the international intellectual property law course.

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In light of these changes and developments, students have to learn not only the distinction between the right of distribution and the right of making available to the public, [FN55] but also new treaty obligations concerning the so-called "paracopyright" protection. [FN56] In addition, teachers have to explain why ***935** intellectual property laws now protect "investment," in addition to original creations, as students have learned in domestic intellectual property courses. [FN57] They also have to discuss the rationales behind the gradual return from national treatment to material reciprocity, [FN58] as well as the pros and cons of recent bilateral or regional efforts. [FN59]

Moreover, because these technologies pose unforeseen challenges to the international intellectual property system, teachers also have to help students develop a good grasp of the new technologies themselves. After all, without understanding the technologies or identifying the new situations created by these technologies, it would be very difficult to assess the impact of technological change on, say, traditional conflict-of-law analyses. It would also be challenging to explain the difference between the right of distribution and the right of making available to the public. Thus, the Internet and new communications technologies have posed challenges to both domestic and international intellectual property law teachers.

C. Global Intellectual Property Law Plus

In the late 1990s, the deepening crisis within the international intellectual property regime became apparent, and the anti-globalization protests in Seattle, Washington, Prague, Quebec, Genoa, and other major cities resulted in wide media coverage. [FN60] While such coverage has led to greater interest in studying international intellectual property law--and more active, and at times more heated, classroom discussion--these latest developments also have broadened the scope of coverage, making it more difficult for teachers to select course materials.

This crisis, in essence, was brought about by the inability of less developed countries to adjust to the high--and, many would say, inappropriate--levels of protection required by the TRIPs Agreement. These countries were not able to ***936** fully implement the treaty by the end of the transitional periods, and reforms in the area have resulted in significant political, social, economic, and cultural problems within their borders. Disillusioned with the WTO process, less developed countries have become increasingly dissatisfied with the international intellectual property regime. As a result, policymakers, scholars, commentators, and nongovernmental organizations begin to question the regime's fairness and legitimacy. Their responses also have led to new international developments that have yet to be covered in a traditional international intellectual property law course.

For example, less developed countries lobbied for the establishment of the Development Agenda, which sought to protect folklore, traditional knowledge, and indigenous practices, as well as to increase access to information, knowledge, essential medicines, and modern communications technologies. [FN61] To facilitate these demands, less developed countries have actively pushed for intellectual property reforms in not only WIPO and the WTO, but also other fora governing public health, human rights, biological diversity, food and agriculture, and information and communications. [FN62] These efforts eventually led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health [FN63] and a recent protocol to formally amend the TRIPs Agreement by adding a new article 31bis. [FN64]

Meanwhile, developed countries responded by sidestepping the multilateral process to introduce bilateral and regional trade and investment agreements-- free trade agreements for the United States and economic partnership agreements for the European Community. [FN65] Using a "divide and conquer" approach, these two trade powers sought to reduce the policy space available to less developed countries for designing their own intellectual ***937** property systems. [FN66] As I pointed out elsewhere, there has now emerged an "international enclosure movement" that pushes less developed countries to offer protection that is even stronger than required by the TRIPs Agreement. [FN67] Because the United

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States used similar tactics in the late 1980s in the run-up to the establishment of the WTO and the TRIPs Agreement, [FN68] it remains interesting to see whether these efforts will eventually lead to the further strengthening of the TRIPs Agreement, creating what commentators have referred to as "TRIPs II." [FN69]

Taken together, the political maneuvering by both developed and less developed countries has resulted in a new era of resistance and contestation. [FN70] From the standpoint of international law and international relations, the activities by both country blocs have led to the emergence of a new forum-shifting phenomenon, through which countries "attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another." [FN71] This phenomenon has made the international intellectual property regime increasingly complex. [FN72] Because the discussion of international intellectual property law developments can no longer be confined to activities within WIPO and the WTO, this regime has also posed major challenges to teachers and students.

If geo-political issues are not challenging enough, three additional developments have made the task of teaching international intellectual property ***938** law even more daunting. First, international intellectual property law developments have become increasingly diverse, multi-faceted, and pluralistic. Although the TRIPs-based international intellectual property system remains state-centered, there are considerable developments outside the state-based system. A good example is the development of the non-national system used to reduce cybersquatting in the Internet domain name system. [FN73] Not only do teachers need to cover the ICANN domain name dispute resolution process, [FN74] they may also have to examine ongoing developments concerning country-code top-level domains, [FN75] and perhaps even internationalized domain names. [FN76]

Second, in response to widespread piracy and counterfeiting problems in less developed countries and in the online world, rights holders have now resorted to the use of technological self-help measures. These measures are not new; encryption technology, for example, was used to protect computer software as early as the 1980s. [FN77] However, the growth of the global marketplace and the increasing volume of international trade have made these developments particularly salient. Recent examples of new technological measures used to protect intellectual assets include digital rights management tools for the protection of copyrighted works, [FN78] genetic use restriction technologies for the sterilization of seeds, [FN79] and the use of RFID (radio-frequency identification) tags and holographic labels to prevent counterfeiting. [FN80]

***939** The use of these measures not only requires teachers to be up-to-date with the latest technologies, but also adds a layer of complexity to the protection rights holders obtain. The protection offered by these self-help measures is not only legal or technological per se, but constitutes a combination of both--which I have described as the technolegal. [FN81] While technology helps reinforce or supplement the existing legal protection, law further prohibits the circumvention of technology. As the two forms of protection interact with each other, and improve over time, they result in a technolegal combination that is often greater than the sum of its parts. It is therefore important to understand not only law and technology, but also the interface between the two.

Third, as teachers and students focus more on the challenges confronting less developed countries and on the local conditions in these countries, they also begin to notice that many existing intellectual property problems--be they piracy and counterfeiting or the lack of affordable access to patented medicines--are partly attributable to political, social, economic, cultural, technological, and historical factors. Many of the problems are development-related; they are, as I have described, either "IP-irrelevant" (non-attributable to intellectual property protection) or "IP-related" (only indirectly attributable to such protection). [FN82]

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In fact, it is virtually impossible to tackle enforcement problems in countries like China, Russia, or Ukraine, without building an "enabling environment for effective intellectual property protection"--an environment that provides key preconditions for successful intellectual property law reform, such as a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, and a critical mass of local stakeholders. [FN83] As Robert Sherwood put it bluntly in his aptly-titled essay, Some Things Cannot Be Legislated, "until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provide." [FN84]

***940** In sum, the international intellectual property law course has changed substantially in the past decade. While the establishment of the TRIPs Agreement and the emergence of new technologies has greatly transformed the international intellectual property system, the new developments have also brought to the course many complex issues that are generally not covered in the traditional international intellectual property law curriculum. Whether one likes it or not, the "law and . . ." movement has finally spread to international intellectual property law, and the subject has become increasingly multidisciplinary.

Today, it is no longer adequate to merely cover international, comparative, and transnational intellectual property law, like it would have been in the pre-TRIPs era. Teachers also have to cover the "harmonized" laws achieved by WIPO, the WTO, and other international and regional treaties as well as developments in ancillary areas that are related to intellectual property protection. In other words, the international intellectual property law course is not just about international intellectual property law or global intellectual property law, but global intellectual property law plus its ancillary areas.

II. Three Questions and Some Bonus Considerations

In light of the many challenges to teaching international intellectual property law, this Part explores how teachers can respond to these challenges by reconceptualizing the course. In the tradition of a Socratic dialogue, this Part focuses on three key questions: (1) Why is international intellectual property law taught in the first place? (2) What topics can teachers cover? (3) How can they effectively present the materials? Through questions and suggestions, this Part invites readers to rethink how an international intellectual property law course can be taught. This Part concludes with some bonus considerations that may be relevant to both teachers and administrators. Because the readers of this Essay are likely to either be teaching international intellectual property law or have an interest in doing so, this Part uses the inclusive "we" to refer to international intellectual property law teachers.

***941** A. Why?

To begin with, let us consider the broader question of why international intellectual property law is, or should be, taught in the first place. Is the course's educational objective to sharpen the students' analytical skills and prepare them for the growing challenges of transnational law practice and the global business environment? Or is it to help students develop a deeper understanding of global legal institutions, lawmaking processes, transnational jurisprudence, and the latest trends in international, comparative, and transnational law? Regardless of the answer, a better grasp of the international intellectual property system will enable students to be more competitive in the job market and outperform their peers when they enter the increasingly global legal profession.

However, if the former is the objective, it may make more sense to teach the course the old-fashioned way, with major emphases on basic international copyright, patent, and trademark laws, but only limited discussion of recent developments in the international intellectual property regime. After all, a lot of the recent developments are unlikely to find their way to legal practice unless the particular student works as a trade official, on the policy side, or in a less developed country. It is, therefore, more important to learn the mechanics and procedural requirements for filing a trademark applic-

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ation in the Madrid or the Community Trade Mark system or a patent application through the PCT than understanding how the WTO Dispute Settlement Body resolves intellectual property disputes.

Even if the instructors are interested in developments in less developed countries, it may be more practical to focus on issues concerning the use and transfer of technology, the management of intellectual property rights and assets, the drafting and negotiation of material transfer agreements, and the development of intellectual property and technology transfer offices. Very few schools, indeed, have the luxury of offering an international licensing or intellectual property management course, and most intellectual property law courses tend to focus so much on the acquisition and enforcement of intellectual property rights that they ignore important issues concerning the commercialization, licensing, management, and transfer of intellectual property assets.

Although international intellectual property law can be taught as a practice-oriented course, the subject has become increasingly theoretical, and many teachers have de-emphasized some of the practical aspects of the course. Indeed, the literature in the area is now filled with discussions of international economic regulations, international regime theories, development studies, third world perspectives, and cross-cultural narratives.

The entering into effect of the TRIPs Agreement has also brought to the field many teachers who have taught or researched in the areas of public ***942** international law, international organizations, international trade, or international business transactions. Those teachers therefore may not be interested in teaching the course as an intellectual property law course alone. Being "migrants" or "visitors," they also may not have the standard experience or background expected from intellectual property law experts. As a result, these teachers are more likely to see the course as one that will help students better understand the changing global legal environment, the international and regional lawmaking processes, and techniques for resolving cross-border disputes. Viewed from this perspective, the course may help reinforce what students have learned in other international and comparative law courses. It therefore can be classified as part of a larger international and comparative law curriculum, in addition to the more specialized, and at times technical, intellectual property law curriculum.

Moreover, studying international intellectual property law can help students acquire the skills needed to become a successful intellectual property lawyer. The international and comparative materials can be used to illustrate the complexities of basic domestic law. As Graeme Dinwoodie, William Hennessey, and Shira Perlmutter wrote in the preface to their widely-used casebook, "One no longer can think or write about, or understand, intellectual property law without considering its international dimension; international developments often drive the content and direction of domestic intellectual property law." [FN85] The converse is also true. Domestic developments and politics have increasingly found their way to international fora, say from Washington or Brussels to Geneva. Thus, teaching international intellectual property law will help students improve their effectiveness as not only an international lawyer, but also as a domestic one.

B. What?

Second, we have to decide what type of materials we want to include in an international intellectual property law course. Do we want to focus on the TRIPs Agreement, or the so-called international intellectual property framework, and then fill the gaps with additional materials? Or do we want to provide a comprehensive introduction to a large array of international intellectual property law topics? If the former, are we ignoring important topics that may be of interest and importance to our students? If the latter, how can we deal with the course's short duration and crowded syllabus, the strong likelihood that we need to reduce everything to its bare essentials, and the potential incoherence and unwieldiness of teaching many disparate topics in a single-semester course? This is, indeed, the age-old "breadth versus depth" ped-

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agogical debate.

***943** Questioning from a different angle, do we want to teach the course as a general survey course for international intellectual property law? Or do we want to teach the course as an advanced seminar that covers in greater depth the international issues that will not, or are unlikely to, be covered in a basic domestic course? As Charles McManis reminded us, "international intellectual property law tend[s] to get short shrift in basic introductory intellectual property courses" and may be "tacked on" as a final topic to be covered in the course. [FN86] In today's increasingly globalized world, omitting materials on international developments may ultimately harm students in terms of both their competitiveness in the job market and full professional development.

In addition to the course's coverage and central focus, we also need to think about how to teach foreign primary materials and secondary sources. Many of the primary materials in the course come from countries that subscribe to a civil law tradition, such as France or Germany in a class on moral rights, Japan in a class on the doctrine of equivalents, or China or Russia in a class on international enforcement. The structure and style of court decisions in these countries are very different from those studied in domestic courses. Judges in those jurisdictions also differ significantly from their American counterparts in terms of their legal traditions, philosophical backgrounds, judicial mindsets, interpretation approaches, and cultural sensitivities. [FN87] Teaching the course using the traditional caselaw method, therefore, may not necessarily be ideal or effective. Even if that method serves some pedagogical goals, such as teaching effectiveness due to familiarity, it may create among students a false sense of security, ignoring the "messiness" of international intellectual property law. Students will be better off struggling with these sources in the classroom rather than in their legal career later! Through classroom discussion, they also may gain a deeper understanding and appreciation of these varied sources and approaches.

An additional challenge comes in the form of treaties, statutes, and soft law recommendations. How many of these major international intellectual property agreements do we need to cover? Do we want to engage students in close readings and analyses of at least the major provisions of these agreements? Do we want to devote more time to helping students understand how to analyze and interpret treaties in general? Most important of all, how can we keep our students' attention when teaching these primary texts, which are rarely considered enjoyable reading materials?

Over the years, I have found it particularly helpful to provide problem sets that include hypothetical fact situations with real clients and problems. Students were often asked to provide advice concerning situations involving foreign laws and international treaties. At the very least, students had to skim ***944** the treaties or other primary texts to find the answers. The different interpretations they had of these texts often provoked interesting classroom discussion, and the better students were able to empathize with their clients' situations. When the hypothetical clients came from foreign countries with which some students were familiar, the discussion also raised questions and responses that further challenged the perspectives and assumptions of their peers.

Another challenge concerns WTO dispute settlement panel decisions. What would be the most effective way to teach these decisions? How could we ensure that students be able to review the decisions carefully and effectively? Any casebook authors can recall the challenge in editing down these decisions; they are usually long, detailed, and fragmented, with some running in excess of two hundred pages. In fact, if we need to reduce the class size intentionally to maintain teaching effectiveness, an efficient--though not necessarily recommended--approach would be to start the class by assigning the full text of the two most recent WTO dispute settlement panel decisions in the intellectual property area. If students are questioned about the details and reasoning of those decisions in the same way they were in their first year about Palsgraf v. Long Island Railroad Co. [FN88] or Pennoyer v. Neff, [FN89] many students would be likely to drop the class. Those who remain are very likely to be dedicated and highly motivated. Of course, the teachers who try this ap-

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proach may also gain a new reputation--for better or worse! So, try it at your own peril!

If the lack of caselaw, the extended details of WTO panel decisions, and the abundance of foreign primary materials and secondary sources do not present sufficient challenges, the recent developments in the international intellectual property arena have forced us to think hard about how to teach related materials that do not fit well in the traditional international intellectual property law curriculum (and whether we should abandon most of these developments entirely). For example, although the access-to-medicines problem touches on important issues about the nature and raison d'être of intellectual property rights, the scope and term of protection, the impact of such protection on economic development and social welfare, and government research and development policies, it also raises difficult issues concerning public health, human rights, institutional infrastructure, and government expenditures. Similarly, the growing development of the WIPO Development Agenda and the increasing emphasis on the protection of folklore, traditional knowledge, and indigenous practices have raised difficult issues concerning the protection of indigenous peoples, human rights, cultural patrimony, biological diversity, agricultural productivity, food security, environmental ***945** sustainability, business ethics, global competition, scientific research, sustainable development, and wealth distribution. [FN90]

Today, the discipline of intellectual property law--both domestic and international--has become increasingly multidisciplinary. If we cover a lot of related materials that are outside the traditional legal disciplines or the field of intellectual property law, we are likely to lose the interests of our students--and worse, ourselves! If we do not, however, we have to wonder whether students would be able to obtain the complete picture and understand the backgrounds and complexities of the situations in the affected countries. Can we effectively teach the protection of folklore, traditional knowledge, and indigenous practices without discussing cultural values, decolonialization efforts, indigenous rights, and the need for political participation and self-determination? Can we fully explain the piracy and counterfeiting problems in China without delving into the potential cultural differences, the country's political and socio-economic systems, and its lack of an effective and independent judiciary? More broadly, can law be understood outside its cultural context, the socio-economic structures of the relevant society, and the underlying ethical and political values? [FN91]

C. How?

Third, we have to decide how to present the materials. Do we want to present them within the larger international intellectual property law framework? Do we want to focus on selected topics or recurring themes? Do we want to break the course down into copyright, patent, and trademark law modules, with additional modules on international enforcement and new sui generis or emerging forms of protection? The latter may resemble more closely the basic domestic intellectual property law course usually offered in law schools--regardless of whether it is a general survey course on intellectual property law or a separate course on copyright, patent, or trademark law.

***946** However, despite its convenience and potential pedagogical effectiveness, some subject matter in international intellectual property law-- and even domestic intellectual property law--does not fit easily into distinct modules. Computer programs, for example, are protectable under various forms of intellectual property rights, including copyrights, patents, trade secrets, unfair competition laws, and sui generis protection of integrated circuit topographies. If we separate the course into different modules, how can we account for the overlapping materials? To make things more complicated, courts in different jurisdictions may treat claims and disputes differently. While a U.S. court may classify the scope of a grant of copyright law as a contract law question, a German court is likely to classify such an issue as a matter of substantive copyright law. [FN92] We therefore have to consider what would be the most ideal way to group the various topics.

As mentioned above, there is also the additional challenge of teaching unfamiliar and difficult materials--foreign

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primary sources, secondary materials, and WTO dispute settlement panel decisions. Should we rely on the caselaw method and the Socratic dialogue? Do we want to have more lectures and policy debates instead? Or do we want to use a problem-oriented approach?

In addition, we have to decide whether we want the course to have any particular focus. Do we want to emphasize the public international law aspects of the course? Do we want to teach international intellectual property law as a form of international economic regulation or international trade law? Or do we want to focus on practical issues or the private international law aspects of international intellectual property law--a hybrid among transnational civil litigation, international business transactions, and domestic intellectual property law?

Is there a specific perspective from which we want to present the materials, or at least some of the materials? Do we want to focus on the tension between the United States and foreign countries? Between the United States and the European Union? Or between developed and less developed countries? What would be an ideal mix of topics that are covered in the course? Does it matter whether we teach the course in New York, East Lansing, or Des Moines? Does it matter whether a majority of the students are pursuing their LL.M./S.J.D. degrees instead of the J.D.'s? Would the coverage be different if there are a significant number of international students? Would the answer to the previous question depend on whether the students come from developed or less developed countries?

We also need to explore how we can help students understand those situations that spark legal responses in the international intellectual property ***947** law regime. How can we expose them to the realities of a world that they may not have seen? How can we help them understand the problems despite the fact that they are likely to come from different cultural, philosophical, and often socio-economic backgrounds? How can we respond to the fact that some students may have different assumptions, or perhaps even misconceptions, about the international legal system in general and some foreign countries in particular? What would be the best way to encourage them to engage in an active, but perhaps politically correct, discussion on sensitive issues? How can we ensure adequate coverage of both Western and non-Western perspectives? These questions are familiar to international law and human rights teachers, who face similar issues concerning how to conceptualize their courses.

Every year, I devote at least fifteen minutes of my international intellectual property law course to a simulation of the international treaty negotiation process. A number of students are each assigned a particular country-- developed, less developed, transition, or imaginary--and provided with information about the country's local conditions. The remaining students serve as observers. Held early in the semester, this exercise forces students to develop a more realistic view of what an international negotiation session is like, how compromises are struck, what the constraints (such as geo-political power, economic strengths, and, most importantly, negotiation time) are. After the students go through such an exercise, many of them are likely to approach the materials differently--often more pragmatically, but unfortunately also more cynically sometimes.

In exploring this exercise, we may want to consider when exactly to introduce the exercise. If it is introduced too early, students may have fewer constraints and be more creative. They do not need to think "outside the box," because that proverbial box has yet to be formed! We also may be able to bring together different worldviews that will be useful in later discussions. When exploring materials later, I usually remind students of the earlier discussions we have had during the mock negotiation session. However, if the exercise is introduced later, as a colleague has done, the negotiation can be more sophisticated. [FN93] Students, by then, will have a better grasp of the international intellectual property system and will be able to make more forceful arguments using what they have learned. The drawback, of course, is their hesitation in offering creative solutions that they assume would not work based on what they have already learned. There are trade-offs either way!

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Moreover, because of the increasing expansion of the international intellectual property regime, the course is now filled with many challenging ethical issues, such as those concerning the protection of isolated human genes ***948** and genetically-engineered microorganisms, the nonconsensual use of biological and genetic materials, and the economic, social, cultural, and environmental impacts of intellectual property protection. How can we get our students to understand their ethical obligations as an international lawyer? How can we alert them to the opportunities for pro bono work, or even full-time employment, as a public interest lawyer? Should we introduce them to such institutions or organizations as the Advisory Centre on WTO Law, the International Centre for Trade and Sustainable Development (ICTSD), Knowledge Ecology International, Médecins Sans Frontières (MSF), Oxfam, Public Interest Intellectual Property Advisors, Inc. (PIIPA), the South Centre, and the Third World Network?

Many serious questions have arisen lately about the fairness and legitimacy of the international intellectual property regime. Are there "teaching moments"? Should we introduce role-playing games to let students develop a better understanding of the varied impacts intellectual property protection has on different player groups? Should we draw on case studies that highlight problems stemming from both under- and overprotection of intellectual property rights? Should we challenge students to think critically about the nature of those rights and to evaluate alternative models to promote creativity and innovation (including free and open source software development, open access formats, and other open and collaborative models)? Is the international intellectual property debate more about the fundamental question of the system's existence than about the balance of the system? [FN94]

D. Bonus Considerations

Finally, this section offers some bonus considerations that may be relevant to both teachers and administrators. From the standpoint of pedagogy and course administration, it is important to consider whether the course should be open to students with no prior training or background in either international or intellectual property law. In my past courses, students did not seem to have any major problems with the materials even without taking prerequisite courses. In fact, those who took international intellectual property law as their first intellectual property law course often brought to the class new ideas that other students would reject quickly based on the fact that those ideas had already been rejected by Congress, the current or prior administration, or the Framers of the United States Constitution. Those students also asked provocative questions that challenged other students to reevaluate the attractiveness of the existing U.S. intellectual property system.

***949** A lack of significant problems with the material, however, does not mean that those students would not be confronted with a steep learning curve. Indeed, they would, especially in the beginning of the course. Thus, a major challenge for us to offer the course without a prerequisite is to help those students quickly grasp the basics of each major form of intellectual property protection. Should we provide overview lectures or primers on basic intellectual property law? Is there any effective way to facilitate classroom discussion so that those students who have taken a basic intellectual property law course can share with their classmates what they have learned (and still remember)? Should we direct the inexperienced students to the extensive and readily accessible introductory materials on the WIPO or WTO websites? (You may be surprised by the abundance of free materials on those sites!) More importantly, how can we respond to the potential gap of knowledge within this wide range of students? At what level of sophistication should we teach the materials?

Second, we need to determine whether the course will be offered as a paper seminar, a regular course with a final examination, or a combination of both. [FN95] Most teachers, including myself, teach the course as a paper seminar. Although many teachers do so because of the smaller class size and the deeper, and usually more specialized, interest of the student body, there are considerable benefits to teaching the course as a seminar. Such a setup allows students to develop

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expertise in their respective areas of interest and potential areas of practice. While some students may be interested in writing a paper on copyright, others may want to learn more about patents or trademarks. Likewise, some students, especially the international ones, may be interested in studying developments in less developed countries. Meanwhile, their classmates may be more interested in the impact of globalization on the American intellectual property system.

Such a setup, however, has significant drawbacks. Some students may tend to write papers on topics that are covered in the beginning of the course. As a result, they may lose interest in the later part of the course-- either because they focus extensively on their research topic or because they know that the later materials will not be tested and are unlikely to be incorporated into the paper. (Having a class participation grade may provide incentives for some of them!)

There may also be challenges for those students who choose to write the paper on topics that are only covered later. Those students are likely to have to conduct research without the benefit of classroom discussion. Although these students may need additional help, which can be provided through consultation ***950** during office hours or special tutorials, the seminar setup for the course is still preferable to a regular course with a final examination.

As with all professors who love to ask questions, I raise more questions than I have answers for. The goal of this Part, however, is not to answer all of these questions, but to raise enough questions so that we can rethink how best to teach the subject. In a Socratic dialogue, we gain insight into the materials through a back-and-forth exchange between the professor and the students. It is through a similar exchange here that we best learn to design a course that would be of interest and practicality to our students. Some of these questions do not have easy answers, or the so-called A answers. Some of these questions also may not result in an either/or choice. Instead, the answers will vary greatly, depending on the experience, background, and interests of teachers as well as the needs and goals of the students.

Conclusion

The development of the international intellectual property system remains in flux, and this field has been developing very rapidly. International intellectual property is messy, dynamic, challenging, multidisciplinary, and increasingly complex, but it is also timely, interesting, stimulating, engaging, and of growing importance. By the time I publish this Essay in St. Louis, which may be read by professional colleagues in Hyderabad, Salvador da Bahia, St. Petersburg, or Wollongong, the international intellectual property landscape will have already evolved from its earlier state when I wrote the first draft in Hong Kong. As new protectable subject matters and technologies emerge and new markets get developed, conceptualizing an international intellectual property law course will remain challenging. Hopefully, this Essay will provide insight into how we can prepare for this challenge.

[FNa1]. Copyright © 2008 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Visiting Professor of Law, Faculty of Law, University of Hong Kong; Research Fellow, Center for Studies of Intellectual Property Rights, Zhongnan University of Economics and Law. The Author would like to thank Mark McKenna for his kind invitation to participate in this Symposium; the participants of the Seventh Annual Intellectual Property Scholars Conference at DePaul University College of Law, in particular Graeme Dinwoodie, Roberta Kwall, Doris Long, Kristen Osenga, Lisa Ramsey, and Darryl Wilson, for sharing their experience; and Alexander Kanous for excellent research and editorial assistance.

[FN1]. Charles McManis was the founding chair of the Section on Intellectual Property Law of the Association of American Law Schools during 1983-1984. Before the Section's founding, the Sections on Law and the Arts and on Law and Computers already existed within the Association. Professor McManis recalled that he was not even sure whether the new section should be named the Section on Intellectual Property Law or the Section on the Law of Unfair Trade Practices. Thanks Chuck for providing these very interesting tidbits.

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[FN2]. For example, the Cardozo Intellectual Property Law Program was established in 1995, and the Center for Intellectual Property Law and Information Technology at DePaul University College of Law was established two years later. See DePaul University College of Law, Center for Intellectual Property Law & Information Technology: History, http:// www.law.depaul.edu/centers_institutes/ciplit/about_us/history.asp (last visited Feb. 2, 2008). The Annual Intellectual Property Scholars Conference, which became the model for future works-in-progress conferences at other law schools, was launched as a joint venture between these two programs on August 9, 2001. The conference was inspired by a proposal from Roberta Kwall, and the Author was the executive director of Cardozo's program at that time. Participants of the inaugural conference included Ann Bartow, Graeme Dinwoodie, Patty Gerstenblith, Wendy Gordon, Cynthia Ho, Timothy Holbrook, Jay Kesan, Roberta Kwall, Mark Lemley, Malla Pollack, Susan Scafidi, Jed Scully, and the Author. See First Annual Intellectual Property Scholars Conference, http:// www.peteryu.com/ipsc01.htm (last visited Feb. 2, 2008). The Berkeley Center for Law and Technology at the Boalt Hall School of Law at the University of California at Berkeley and the Stanford Program in Law, Science and Technology at Stanford Law School have since joined as the conference's co-organizers.

[FN3]. For discussion of the growing coverage of intellectual property law in American law schools, see generally Roberta Rosenthal Kwall, The Intellectual Property Curriculum: Findings of Professor and Practitioner Surveys, 49 J. Legal Educ. 203 (1999); Kenneth L. Port, Intellectual Property Curricula in the United States, 46 IDEA 165 (2005).

[FN4]. Kwall, supra note 3, at 208-09. These schools were Boston University, Brooklyn, Chicago, Chicago-Kent, Cincinnati, Columbia, George Mason, Indiana--Bloomington, John Marshall, Loyola--Los Angeles, Marquette, Miami, Nebraska, Saint Louis, South Texas, Suffolk, Syracuse, Texas, and Tulane. Id. The overall percentage among all ABA-accredited law schools was likely to be lower than the reported twenty-eight per cent. Most law schools that had strong intellectual property law programs already responded to the survey, and those that did not were unlikely to have a critical mass of students to justify the offering of such a course. See id. at 203-04.

[FN5]. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

[FN6]. International Intellectual Property Anthology (Anthony D'Amato & Doris Estelle Long eds., 1996).

[FN7]. See Frederick M. Abbott et al., The International Intellectual Property System: Commentary and Materials (1999); Graeme B. Dinwoodie et al., International Intellectual Property Law and Policy (2001); Paul Goldstein, International Intellectual Property Law: Cases and Materials (2001); Doris Estelle Long & Anthony D'Amato, A Coursebook in International Intellectual Property (2000).

[FN8]. Port, supra note 3, at 166, 170. Unlike Professor Kwall's survey, Professor Port's included both accredited and unaccredited law schools. Id. at 166. Barry University School of Law was the only provisionally accredited or unaccredited law school on the list with at least one course in international or comparative intellectual property law. See Port, supra note 3, app. I, http://www.idea.piercelaw.edu/Articles/46/appendices/PortAppI.pdf (last visited Jan. 14, 2008). The school was provisionally accredited at the time of the survey and was granted full accreditation on December 2, 2006. See Barry University School of Law Granted Full ABA Accreditation, Dec. 2, 2006, http:// www.barry.edu/law/details.aspx?ID=11510.

[FN9]. Frederick M. Abbott et al., International Intellectual Property in an Integrated World Economy (2007) [hereinafter Abbott et al., Integrated World Economy]; Daniel C.K. Chow & Edward Lee, International Intellectual Property: Problems, Cases, and Materials (2006); Peter K. Yu, International Intellectual Property Law and Policy (forthcoming 2008).

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[FN10]. In the copyright context, see, for example, Richard C. De Wolf, An Outline of Copyright Law 168-90 (1925); Herbert A. Howell, The Copyright Law 193-203 (3d ed. 1952); Alan Latman, The Copyright Law: Howell's Copyright Law Revised and the 1976 Act 260-73 (5th ed. 1979).

[FN11]. Stephen P. Ladas, The International Protection of Industrial Property (1930); Stephen P. Ladas, The International Protection of Literary and Artistic Property (1938). These two treatises were followed by Steven P. Ladas, Patents, Trademarks, and Related Rights: National and International Protection (1975).

[FN12]. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

[FN13]. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

[FN14]. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, revised at Stockholm July 14, 1967, 828 U.N.T.S. 389.

[FN15]. Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, revised at Stockholm July 14, 1967, 923 U.N.T.S. 205.

[FN16]. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

[FN17]. Convention on the Grant of European Patents, Oct. 5, 1973, as amended by Decision of the Administration Council of the European Patent Organization of Dec. 21, 1978, 1065 U.N.T.S. 255 [hereinafter European Patent Convention].

[FN18]. Treaty Establishing the European Economic Community (Treaty of Rome), opened for signature Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

[FN19]. See, e.g., Council Directive 89/104, To Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1; Council Regulation 40/94, On the Community Trade Mark, 1994 O.J. (L 11) 1.

[FN20]. Jane C. Ginsburg, International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?, 47 J. Copyright Soc'y U.S.A. 265 (2000) [hereinafter Ginsburg, International Copyright].

[FN21]. See Commission Proposal for a Council Regulation on the Community Patent, COM (2000) 412 final (Aug. 1, 2000).

[FN22]. See Peter K. Yu, The Copyright Divide, 25 Cardozo L. Rev. 331, 336-53 (2003) (discussing copyright protection for foreign authors in the United States in the eighteenth and early nineteenth centuries).

[FN23]. See, e.g., Abbott et al., Integrated World Economy, supra note 9, at 3 (stating that "[t]he TRIPS Agreement represented a sea change in the international regulation of IPRs"); Charles R. McManis, Teaching Current Trends and Future Developments in Intellectual Property, 52 St. Louis U. L.J. 855, 856 (2008) (noting that "the field of international intellectual property law underwent a tectonic shift with the promulgation of the [TRIPs Agreement]").

[FN24]. See TRIPs Agreement, supra note 5, art. 64 (mandating that disputes arising under the TRIPs Agreement be

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settled by the WTO dispute settlement process).

[FN25]. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[FN26]. As Wilfred Jenks, the former Director-General of the International Labour Organization, described:

> The lex prior principle was stated by Vattel as being that 'if there is a conflict between two treaties made with two different States, the earlier treaty prevails'. The principle is derived from the analogy of the law of contract and has an important application in international law in respect of conflicts between bilateral agreements (and other agreements with restricted participation) conferring inconsistent rights on different parties.

C. Wilfred Jenks, The Conflict of Law-Making Treaties, 30 Brit. Y.B. Int'l L. 401, 442 (1953); see id. at 426, 442-45 (discussing the lex prior principle); see also Vienna Convention, supra note 25, art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

[FN27]. "The lex posterior principle [or the last in time rule] may be defined as being that later legislation supersedes earlier legislation." Jenks, supra note 26, at 445; see Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("[I]f [two treaties] are inconsistent, the one last in date will control the other[,] provided, always, the stipulation of the treaty on the subject is self-executing."); Jenks, supra note 26, at 445-46 (discussing the lex posterior principle); see also Vienna Convention, supra note 25, art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.").

[FN28]. As Hugo Grotius wrote about the lex specialis principle: "Among agreements that are equal in respect to the qualities mentioned that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general." Jenks, supra note 26, at 446 (quoting Hugo Grotius); see id. at 446-47 (discussing the lex specialis principle); Christopher J. Borgen, Resolving Treaty Conflicts, 37 Geo. Wash. Int'l L. Rev. 573, 589-90 (2005) (discussing the lex specialis principle).

[FN29]. See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (noting that the authoritative Nimmer treatise "moves too quickly past the Berne Convention Implementation Act of 1988"); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) (explaining the importance that the "Berne Convention is not self-executing").

[FN30]. See Peter K. Yu, Succession by Estoppel: Hong Kong's Succession to the ICCPR, 27 Pepp. L. Rev. 53, 80-93 (1999) (discussing the various theories concerning the state succession of treaties).

[FN31]. Paul Edward Geller, New Dynamics in International Copyright, 16 Colum.-VLA J.L. & Arts 461, 469 (1992); see Peter K. Yu, Currents and Crosscurrents in the International Intellectual Property Regime, 38 Loy. L.A. L. Rev. 323, 437-38 (2004) [hereinafter Yu, Currents and Crosscurrents] (discussing the growing importance of public international law and the shift from private international law to public international law).

[FN32]. See Dinwoodie et al., supra note 7, at vi ("An understanding of the interaction between state-to-state relations and private enforcement of rights is crucial to appreciate fully the dynamic underlying the development of [international intellectual property] law.").

[FN33]. See Peter K. Yu, The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade, 26 Fordham Int'l L.J. 218, 224 (2002) (stating that "[h]armonization is a two-way street"). For discussion

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of the Section 301 process, see Peter K. Yu, From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century, 50 Am. U. L. Rev. 131, 138-40 (2000).

[FN34]. For a seminal work on legal transplants, see generally Alan Watson, Legal Transplants: An Approach to Comparative Law (2d ed. 1993). For discussion of the harmonization process, see Yu, Currents and Crosscurrents, supra note 31, at 429-35.

[FN35]. See TRIPs Agreement, supra note 5, arts. 22-24 (geographical indications), 25-26 (industrial designs), 27(3)(b) (plant variety protection), 35-38 (layout designs of integrated circuits), 39 (undisclosed information).

[FN36]. Id. art. 10(1).

[FN37]. Id. art. 23.

[FN38]. Id. art. 27(1).

[FN39]. Id. art. 27(3)(b).

[FN40]. TRIPs Agreement, supra note 5, art. 31.

[FN41]. Id. art. 35.

[FN42]. Id. art. 39(3).

[FN43]. See Assafa Endeshaw, The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot, 10 Cardozo J. Int'l & Comp. L. 47 (2002) (criticizing the application of universal templates to non-industrial nations); Rochelle Cooper Dreyfuss, TRIPS--Round II: Should Users Strike Back?, 71 U. Chi. L. Rev. 21, 25 (2004) ("Without adequate counsel, [many less developed countries] may choose to meet their TRIPS obligations by simply transcribing its mandates into law."); Peter K. Yu, TRIPS and Its Discontents, 10 Marq. Intell. Prop. L. Rev. 369, 388 (2006) ("The unexamined transcription of the TRIPs Agreement into law ... might result in an unbalanced intellectual property system."); cf. Peter K. Yu, From Pirates to Partners (Episode II): Protecting Intellectual Property in China in Post-WTO China, 55 Am. U. L. Rev. 901, 906-23 (2006) (cautioning against the crediting of recent changes in the Chinese intellectual property system to the WTO accession despite exaggerated claims by policymakers, industry groups, and commentators).

[FN44]. See Peter K. Yu, The International Enclosure Movement, 82 Ind. L.J. 827, 901-06 (2007).

[FN45]. See Ginsburg, International Copyright, supra note 20; see also Yu, Currents and Crosscurrents, supra note 31, at 354-75 (discussing the transformation from international agreements to a supranational code).

[FN46]. 447 U.S. 303 (1980).

[FN47]. One such controversy concerns the protection of isolated human genes and genetically-engineered microorganisms. See, e.g., Margo A. Bagley, A Global Controversy: The Role of Morality in Biotechnology Patent Law, in 2 Intellectual Property and Information Wealth: Issues and Practices in the Digital Age 317 (Peter K. Yu ed., 2007) [hereinafter Intellectual Property and Information Wealth]; Li Yahong, Human Gene Patenting and Its Implications for Medical Research, in 2 Intellectual Property and Information Wealth, supra, at 347.

[FN48]. TRIPs Agreement, supra note 5, art. 27(2).

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[FN49]. European Patent Convention, supra note 17, art. 53(a).

[FN50]. TRIPs Agreement, supra note 5, art. 27(3)(b).

[FN51]. Marci A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 Vand. J. Transnat'l L. 613, 614-15 (1996).

[FN52]. WIPO Copyright Treaty, adopted Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 1 (1997) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997) [hereinafter WPPT].

[FN53]. Council Directive 96/9, On the Legal Protection of Databases, 1996 O.J. (L77) 20 [hereinafter EC Database Directive] (offering sui generis protection to database producers).

[FN54]. Council Directive 01/29, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

[FN55]. See WCT, supra note 52, art. 8 (granting to authors "the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works" (emphasis added)); WPPT, supra note 52, arts. 8(1), 10, 12(1), 14 (providing to performers and phonogram producers the exclusive right of making available to the public). For a discussion of the right of making available to the public, see generally Jane C. Ginsburg, The (New?) Right of Making Available to the Public, in Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish 234 (David Vaver & Lionel Bently eds., 2004). For the origin of this right and the compromise struck between the European Union and the United States, see Pamela Samuelson, The U.S. Digital Agenda at WIPO, 37 Va. J. Int'l L. 369, 392-98 (1997).

[FN56]. See WCT, supra note 52, art. 11 (requiring parties to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors" to protect copyrighted works); id. art. 12 (requiring parties to protect rights management information from alteration and removal in an effort to conceal or facilitate infringement); WPPT, supra note 52, arts. 18-19 (stipulating similar requirements concerning the protection of performances or phonograms).

[FN57]. See EC Database Directive, supra note 53, art. 7(1) (requiring all EU member states to implement legislation that grants sui generis protection to databases created as a result of "substantial investment" by database producers); Yu, The International Enclosure Movement, supra note 44, at 892- 901 (discussing the incentive-investment divide).

[FN58]. See Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 902(a)(1) (offering sui generis protection to the layout designs of foreign-manufactured integrated circuits and chips only if the foreign country afforded similar protection to U.S. manufacturers); EC Database Directive, supra note 53, art. 11 (denying protection to databases produced in non-EU countries that do not offer comparable protection to databases); Yu, Currents and Crosscurrents, supra note 31, at 375-81 (discussing the use of reciprocal provisions).

[FN59]. See Yu, Currents and Crosscurrents, supra note 31, at 392-400 (discussing the growing use of bilateral and regional trade agreements).

[FN60]. See Peter K. Yu, World Trade, Intellectual Property, and the Global Élites: An Introduction, 10 Cardozo J. Int'l & Comp. L. 1, 3 (2002).

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[FN61]. See Christopher May, The World Intellectual Property Organization: Resurgence and the Development Agenda (2007) (discussing WIPO and its new Development Agenda); Margaret Chon, Intellectual Property and the Development Divide, 27 Cardozo L. Rev. 2821, 2885 (2006) (proposing to integrate a principle of substantive equality "throughout intellectual property globalization decision-making via a legal rule akin to the strict scrutiny doctrine in U.S. constitutional law").

[FN62]. See Yu, Currents and Crosscurrents, supra note 31, at 389-90.

[FN63]. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

[FN64]. General Council, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 8, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

[FN65]. See, e.g., Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, available at http://www.ustr.gov/Trade_ Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html; United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_ Text/asset_upload_file148_5168.pdf; United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_ upload_file708_4036.pdf.

[FN66]. See Yu, The International Enclosure Movement, supra note 44, at 855- 72 (discussing the growing enclosure of policy space at the international level).

[FN67]. See id.

[FN68]. See Yu, Currents and Crosscurrents, supra note 31, at 361-62, 412- 13 (discussing the use of Section 301 sanctions during the TRIPs negotiations to speed up the negotiating cycle, isolate hardliner opposition countries, and persuade other less developed countries to alter their position).

[FN69]. See, e.g., Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 48 (2d ed. 2003); Graeme B. Dinwoodie, The International Intellectual Property Law System: New Actors, New Institutions, New Sources, 98 Am. Soc'y Int'l L. Proc. 213, 217 (2004); Dreyfuss, supra note 43, at 21.

[FN70]. See Susan Sell, Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement, 38 Loy. L.A. L. Rev. 267 (2004); Yu, Currents and Crosscurrents, supra note 31.

[FN71]. Laurence R. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 Yale J. Int'l L. 1, 14 (2004) (footnote omitted). For excellent discussions of the regime-shifting phenomenon, see, for example, id.; John Braithwaite & Peter Drahos, Global Business Regulation 564-71 (2000).

[FN72]. I coined the term the "international intellectual property regime complex" to describe this complex regime. Peter K. Yu, International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia, 2007 Mich. St. L. Rev. 1, 9-16. The term "regime complex" originated from Kal Raustiala & David G. Victor, The Regime Complex for Plant Genetic Resources, 58 Int'l Org. 277, 279 (2004). David Leebron has also used the term "conglomerate regime." David W. Leebron, Linkages, 96 Am. J. Int'l L. 5, 18 (2002).

[FN73]. See Yu, Currents and Crosscurrents, supra note 31, at 400-06 (discussing the growing trend of non-

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nationalization).

[FN74]. See Internet Corp. for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy (Aug. 26, 1999), available at http:// www.icann.org/udrp/udrp.htm.

[FN75]. For discussion of earlier developments concerning country-code top-level domains, see generally Peter K. Yu, The Origins of ccTLD Policymaking, 12 Cardozo J. Int'l & Comp. L. 387 (2004).

[FN76]. For discussion of internationalized domain names, see generally Molly Torsen, The Domination of the English Language in the Global Village: Efforts to Further Develop the Internet by Populating It with Non-Latin-Based Languages, 12 Rich. J.L. & Tech. 2 (2005); Xue Hong, The Voice of China: A Story of Chinese-Character Domain Names, 12 Cardozo J. Int'l & Comp. L. 559 (2004).

[FN77]. See Peter K. Yu, Anticircumvention and Anti-anticircumvention, 84 Denv. U. L. Rev. 13, 14 (2006) (noting that technological protection measures "have existed for at least the last couple of decades").

[FN78]. For the problems of digital rights management tools in less developed countries, see generally id. at 40-57.

[FN79]. For discussion of genetic use restriction technologies, see generally Timothy Swanson & Timo Goeschl, Diffusion and Distribution: The Impacts on Poor Countries of Technological Enforcement Within the Biotechnology Sector, in International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime 669 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

[FN80]. See Susan Scafidi, Intellectual Property and Fashion Design, in 1 Intellectual Property and Information Wealth, supra note 47, at 115, 124.

[FN81]. See Peter K. Yu, New Media at the Turn of the Century: Toward an Integrated Law, Technology, and Society Approach (2007), available at http:// ssrn.com/abstract=965579 (discussing the combination of the legal and the technical as "the technolegal").

[FN82]. For discussion of the trichotomy of "IP-relevant," "IP-related," and "IP-irrelevant" causes of the access-to-medicines problem in less developed countries, see Yu, The International Enclosure Movement, supra note 44, at 852-53.

[FN83]. See Peter K. Yu, Intellectual Property, Economic Development, and the China Puzzle, in Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era 173, 213-16 (Daniel J. Gervais ed., 2007) (discussing the importance of an "enabling environment" for effective intellectual property protection).

[FN84]. Robert M. Sherwood, Some Things Cannot Be Legislated, 10 Cardozo J. Int'l & Comp. L. 37, 42 (2002); accord Paul J. Heald, Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game, 88 Minn. L. Rev. 249, 252 (2003) ("[A] rational strategy for developing countries must not only consider compliance options, but must also account for institutional competency--legislative, judicial, executive, and diplomatic--in order to make the most of available options."); Keith E. Maskus et al., Intellectual Property Rights and Economic Development in China, in Intellectual Property and Development: Lessons from Recent Economic Research 295, 297 (Carsten Fink & Keith E. Maskus eds., 2005) (stating that, in the context of China, "[u]pgrading protection for IPRs alone is a necessary but not sufficient condition for th[e] purpose" of maximizing the competitive gains from additional innovation and technology acquisition over time, with particular emphasis on raising innovative activity by domestic entrepreneurs and enterprises).

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[FN85]. Dinwoodie et al., supra note 7, at v.

[FN86]. McManis, supra note 23, at 859.

[FN87]. See Yu, The Harmonization Game, supra note 33, at 233-34.

[FN88]. 162 N.E. 99 (N.Y. 1928).

[FN89]. 95 U.S. 714 (1877).

[FN90]. See, e.g., Rosemary J. Coombe, Culture: Anthropology's Old Vice or International Law's New Virtue?, 93 Am. Soc'y Int'l L. Proc. 261 (1999); Rosemary J. Coombe, Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity, 6 Ind. J. Global Legal Stud. 59 (1998); Rosemary J. Coombe, The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law, 14 St. Thomas L. Rev. 275 (2001).

[FN91]. As John Kozyris explained:

> ... [Y]ou cannot truly pursue the comparative method through the study of formal legal texts alone. It is necessary to get to know what is behind the texts and also, even more important, how they function. This requires understanding the legal culture that produced the laws, and more broadly, the social and economic structures and the ethical and political values that support them.

P. John Kozyris, Comparative Law for the Twenty-First Century: New Horizons and New Technologies, 69 Tul. L. Rev. 165, 168 (1994).

[FN92]. See Ginsburg, International Copyright, supra note 20, at 281.

[FN93]. One colleague asks her students to keep their treaty negotiation identities for the entire semester. She will then ask questions about their perspectives based on the topic covered in the class.

[FN94]. Alan Story asked that particular question in relation to the continued existence of the Berne Convention. See Alan Story, Burn Berne: Why the Leading International Copyright Convention Must Be Repealed, 40 Hous. L. Rev. 763, 764-69 (2003).

[FN95]. Some colleagues, including one of the Authors' professors, allow students to complete both the final examination and the seminar paper. In doing so, students have the opportunity to maximize their final grades based on their strengths.

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***113** PEDAGOGICAL SUBVERSION IN CLINICAL TEACHING: THE WOMEN & THE LAW CLINIC AND THE INTELLECTUAL PROPERTY CLINIC AS LEGAL ARCHAEOLOGY

Ann Shalleck [FNa1]

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Legal pedagogy provides an important site for the subversion of dominant conceptions of law. For more than two decades, feminist law teachers have sought to enable our students to understand how the law interacts with social power to shape women's experience in society, to critique how the law operates in any particular situation with regard to gender, and to convey how lawyers have space to shape new legal tools that challenge the oppression of women in society. Feminist law teachers have taught about how the discourse of the law affects women's lives and how the material forces that shape women's experiences are related to legal rules and legal institutions. We have designed methods both to help students analyze problematic conceptions of women and gender that appear in legal texts and to foster in students alternative ways of approaching law that help to challenge oppressive practices that harm women. Thus, throughout its history, feminist pedagogy has had both a critical and a transformative agenda.

Our pedagogical efforts have developed over time, reflecting our changing understandings of the relationship of law, sex, and gender. They reflect the constraints and possibilities that have confronted us within the context of our particular educational institutions. As are other forms of feminist thought and action, feminist legal pedagogy is dynamic. Feminist pedagogical innovations may be suppressed or embraced; they may be ridiculed or celebrated. A feminist pedagogical innovation, once ***114** introduced, not only changes the contours of legal pedagogy, but is changed itself. What begins as subversive may be accommodated, distorted, expanded, or transformed once it becomes a part of legal academic culture. Therefore, as with all aspects of feminist legal thought and action, we must constantly reassess the impact and meaning of our pedagogical practices.

Despite recurring challenges from a variety of critical perspectives, American legal education, to a great extent, has continued to be about the authoritative pronouncements of doctrine by courts. [FN1] Primarily, students read and dissect appellate cases. Statutes and administrative rules make a supporting appearance, as do excerpts from other disciplines. Many law teachers, among them feminists, have, within the spaces available to them at their own institutions, introduced modifications of this basic model. [FN2] ***115** Some use critical readings to expose students to multiple and conflicting interpretations of cases. [FN3] Others conduct simulations in which students ***116** work with a legal problem in the context of a lawyering activity. [FN4] Still others, through clinical programs, have students provide representation to clients under the supervision of faculty and reflect upon their activities as lawyers, the experiences of clients, and the operation of legal institutions. [FN5] These efforts and countless others have in large and small ways challenged the fundamental model of American legal education. Feminist law teachers ***117** have been at the forefront of efforts to change legal pedagogy and the implicit lessons about law and legal institutions that it conveys.

This panel on Subversion Through Pedagogy has examined how three different, yet related, pedagogical practices destabilize one aspect of the dominant form of legal knowledge. The three practices all question the as-

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sumption that law is only, or even primarily, the pronouncements of courts and legislatures. All three pedagogies diverge from the project of teaching a feminist critique of appellate court opinions. Engaging in critique of cases can implicitly transmit the lesson that official pronouncements constitute the law, even if feminist analysis of cases and statutes is substantially different from other approaches to case analysis. All three pedagogical practices identified here look beyond official pronouncements to find the law.

Professor Deborah Threedy presents "legal archaeology" as a subversive teaching tool, as well as a scholarly approach. [FN6] When students undertake the project of reconstructing the historical context of a case from clues extrinsic to a court opinion itself--from trial transcripts, contemporaneous accounts, personal narratives, and other historical materials--they examine differently the official story as articulated by the court and see how the official story distorts or submerges alternative stories. [FN7] Legal archaeology as a teaching tool, as well as a method of analysis, subverts the dominant form of legal understanding in at least three ways.

First, legal archaeology conveys unsettling ideas about what is worthy of study. [FN8] The materials of legal archaeology force students to see the texts and sources outside the confines of the court opinion as essential to knowledge of what the law is. Only through these materials can the students construct other stories about the operation of law and comprehend how and why the official story of law assumes its form and content. Many contemporary law students are strikingly similar to Christopher Columbus Langdell, seeking conceptual rules from appellate decisions, or to a caricatured legal realist, viewing appellate rules through an ungrounded appeal to functional interests (such as predictability, efficiency, flexibility, or fairness) termed "policy." [FN9] They inhabit the world of the law library (now the virtual world of computerized legal sources) in the quest to know the law. [FN10] Beyond the realms of Lexis and Westlaw lies a different territory. [FN11] Law school implicitly tells these students that materials beyond ***118** legal pronouncements are secondary to legal knowledge. [FN12] Legal archaeology requires students to develop an appreciation of diverse materials in order to understand the law. [FN13]

Second, legal archaeology demands a method different than the one propounded in law schools. Deciphering the court's opinion is only one part of analyzing the story of the law. Students must search for the diverse and conflicting narratives that coexisted when the court constructed the official account. They must look to what is "irrelevant" from the perspective of the official story because the point is to recover the very narratives that the court rejected or ignored. Seeing the range of assumptions embedded in the conflicting stories and analyzing the choices fixed in the court's account, the student can begin to decipher the reasons driving the construction of the official story. [FN14]

Third, legal archaeology alters the content of legal knowledge. Law is the amalgam of conflicting stories told by different people, in different relationships to the legal system, in different segments of society. When our students unearth these narratives, they see what law is in its complexity, contradictions, and ambiguities. In the interaction of stories, the students can track the relationship of law as written and law as experienced, the impact on people's lives of legal and social institutions through which legal experience is mediated, and the relationship of law and social power. Legal archaeology helps unmask how law is used by those with power and by those without. [FN15]

In legal archaeology, students confront the importance of facts. They quickly discover that mastering legal doctrine, even in all its indeterminacy and mutability, is of only limited value in discerning how any particular case or set of cases develops. The students must take facts seriously [FN16] and learn methods of factual analysis that incorporate an appreciation for the intricacies, contradictions, indeterminacies, and uncertainties of facts.

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As critical legal thought has problematized legal analysis, legal archaeology problematizes factual analysis.

One way to see the Gender & Constitutional History course created by ***119** Professors Patricia Cain and Linda Kerber, is as an experience in legal archaeology. [FN17] Professors Cain and Kerber have transformed the narrative of constitutional doctrine, which drives most constitutional law courses, into a narrative of women's experience with constitutional law in the historical, social, and political context of the time. Doctrinal categories do not shape the accounts the students study. Rather, constitutional doctrine inscribes the ways women have attempted to remedy an injustice or have used the law to change their position in society. The students study constitutional law as it reflects and affects women's social and political power.

The course demonstrates how decoding the operation of gender is a central component in an archaeological project. [FN18] Understanding constitutional history requires examining the workings of gender in the world. Therefore, as students discover the underlying accounts of women in cases that employ constitutional doctrine, they see women's experience not divided by legal category, but grounded in a specific historical period characterized by particular normative structures of thought affecting concepts of gender, the experience of gender, and doctrines of constitutional law. Students search through archives to uncover clues from the multiple stories that eventually resulted in the narrative in the court's opinion. From these factual clues, they develop avenues of investigation. They probe to uncover the women's experiences and thoughts. They discover how legal, political, and social institutions functioned in the women's lives. They explore the political and social forces that affected the women, the lawyers, and the courts. From this information, the students construct the multiple stories outside the official account that nonetheless constitute constitutional law. Without these other stories, the court's opinions mask how constitutional law operates with respect to gender. With these alternative narratives, the students can better interpret why the doctrines of constitutional law are constructed as they are, evaluate the choices implicit in the official doctrinal narrative, and imagine how constitutional doctrines might be constructed differently.

This course also furthers the archaeological project by respecting chronology. [FN19] Constitutional law casebooks, which convey the dominant accounts of constitutional law, are structured around doctrinal categories. [FN20] These doctrinal classifications often distort the interrelationships of multiple aspects of women's experiences. Women's lives as workers, citizens, caregivers, and reproductive individuals are disconnected from each other and addressed only as their activities appear within each ***120** doctrinal context. Thus, the doctrinal stories obscure the interconnections among women's constitutional claims regarding the multiple aspects of their lives. Furthermore, the doctrinal organization undermines stories of structures of oppression told through feminist social movements. Many social movements of women framed constitutional claims to equality, fairness, and participation in the life of society within the context of opposition to patriarchal structures of power. [FN21] In this course, unlike in most other constitutional law courses, students do not learn to fit past cases into a current doctrinal matrix. Rather, in finding the alternative stories of individuals and social movements, students immerse themselves in the ways of thought and structures of society in which women lived, social movements developed, and the doctrines of constitutional law of the time took shape. They come to understand the processes by which the official accounts of women's oppression were chosen over others or shaped in interaction with other competing stories.

Clinical courses, too, can subvert the understanding of law as authoritative pronouncement. In this article, I analyze two clinical courses I teach at American University, Washington College of Law as experiences in legal archaeology. In both the Women & the Law Clinic [FN22] and the Intellectual Property Clinic, [FN23] students experience the methodological and substantive subversions of legal archaeology. In the Women & the Law Clin-

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ic, as in Professors Cain and Kerber's Gender & Constitutional History course, the importance of gender to subversion is apparent. In the Intellectual Property Clinic, as in many other courses that do not explicitly address gender, the subversions identified by legal archaeology present the possibility of revealing how gender is part of the stories excluded from the official accounts of the law. Although the focus of legal archaeology may often be on the past, its methods can be equally useful in reconceiving law in the present. Therefore, as Gender & Constitutional History can be seen as an example of legal archaeology, so can student representation of clients in the Women & the Law Clinic and the Intellectual Property Clinic.

In both clinics, the students focus not on issues of doctrine, but on the activities involved in lawyering. As they represent a client under the supervision of a faculty member and as part of a structured clinical course, students engage in and analyze the activities of the lawyer. They ***121** experience the development of their relationship with a client, and they undertake all the tasks involved in representing that person or group. In the class, they explore the dynamics and nature of their relationship with the client; understand the client's often changing view of the situation; reflect upon each choice they make as lawyers in shaping and pursuing the legal matter(s) in the client's life; analyze the institutions that mediate the client's experience with legal rules and procedures; and examine the interaction of legal concepts, rules, and procedures with social and political power.

Although the structure of these two clinical courses, like many other clinical courses, requires the students to engage in work that differs greatly from the reading and analysis of appellate cases, the differences between the activities in a clinical course and those in any other law school course do not necessarily entail a challenge to the idea of law as the official account constructed by courts and legislatures. The message of a clinical course could be that lawyers engage in the process of applying "the law" as propounded by courts, legislatures, and administrative agencies to the particular "facts" of a client's case. This approach to clinical study would reinforce rather than subvert the concept of law as authoritative pronouncement. The students' activity as lawyers, the experiences and stories of the client, the meanings that clients, students, and other actors in the situation attribute to the different aspects of the representation, and the social and historical context within which representation develops could be seen as interesting and important but not part of "the law."

A clinical course, although not inherently subversive, creates multiple opportunities to learn a different way to understand what constitutes the law. [FN24] Three elements that characterize both the Women & the Law Clinic and the Intellectual Property Clinic, as well as other clinical courses throughout the country, echo the methodological and substantive subversions of legal archaeology that are essential to the project of conveying a different understanding of what the law is and how it operates.

***122** First, the activities of the lawyer and the client are worthy of study. While lawyering has come to be a part of the curriculum of most law schools in the form of clinical programs, legal academia still contests that focusing upon the activities of the lawyer comprises more than a "skills" course, a course in how to apply the law as it is transmitted in the rest of the curriculum. [FN25] Therefore, the analysis of lawyering undermines the dominant conception of law as authoritative text only when the activities of the lawyer are treated as an aspect of law creation and elaboration. [FN26] The reconceptualization of lawyering as part of law is a central component of the subversive potential of a clinic. For example, in the Women & the Law Clinic, when students represent a woman who has been abused in an intimate relationship, they learn about the law of domestic violence from the clues they find outside the cases or statutes, or even outside of the formal court procedures they might employ as part of a case. They learn about how the client's experience of being physically harmed by someone close to her becomes a subject of the law. They struggle to learn what the experience means for that woman. They must acknowledge and destabilize their own frameworks for understanding her experience. They grope to-

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wards learning how to accept her framework and not impose their own through the conscious or unconscious use of their power within the relationship. They discover that the woman's understanding of her situation is often dynamic, changing as she repeatedly reinterprets her experience in light of her interactions with other people, the history of the relationship in which the abuse occurred, her feelings for the person who harmed her, her material resources, her other needs, the response of the lawyer, her interactions with others during the steps in the legal process, her attitudes toward the law and the legal system, and factors that remain elusive. Students meet people who are angry at their client for causing the ***123** abuse or for remaining in a relationship in which abuse occurs. They deal with officials, from court personnel to judges, child welfare workers, and prosecutors, who often think they know what is best for the woman and for society. Students encounter court procedures and court forms that serve to limit the scope and applicability of the legal action. [FN27]

Students are often surprised to see that a legal action originally sought by feminists as a legal tool for providing women some protection from dangerous situations of domestic violence has been transformed into a routinized set of procedures that often distort women's experiences, endanger them further, threaten their custody of their children, fail to address the range of needs women in abusive relationships have, and operate differently depending on race, ethnicity, and class. [FN28] Students who enter the clinic thinking that the official rubric of legal actions to enjoin abusive behavior by a family member or an intimate partner constitutes the legal framework for addressing domestic violence soon see that they must listen to and absorb the multiple stories of intimate violence in order even to begin to comprehend how these experiences take on meaning in the legal system. If students try to squeeze their client into the statutory categories and requirements or counsel her to fit within judicial expectations of how an abused woman should behave, they feel the multiple tensions among the woman's experience as conveyed to them, the reactions of others to her situation, and the construction of the legal rules. [FN29] Thus, students discover that the material they find in the world is essential to the law of domestic violence. Furthermore, they learn that these tensions are not irrelevancies ***124** to be suppressed or bemoaned. [FN30] Rather, they provide a starting point for lawyers to engage in a constant process of seeking to reshape the law to reflect their discoveries about women's experience of domestic violence. With this knowledge and experience, the students are poised to question how and why the law of intra-family offenses came to be as it is and how it could be different.

As in the Women & the Law Clinic, the students in the Intellectual Property Clinic must listen for and identify clues that exist outside of formal legal materials in order to understand the law. In representing a woman inventor seeking to claim infringement of her patent, the students in the clinic must look past the law of infringement. As they face the limited nature and scope of the type of their client's patent, they pursue clues about the conditions under which she obtained that patent. By following these clues, they discover an invention submission company and unravel the circumstances under which the firm induced her to pay for a worthless patent. They see that the operation of this company, the company's connections to other firms, the client's aspirations in contracting for the services, and her interactions with its representatives are critical to understanding the limitations she faces in claiming that others have improperly taken and used her invention. Had the students not listened carefully to all parts of her account, in particular those that appeared "irrelevant" to her intellectual property claim, the students could easily have concluded that the law did not provide her with the remedy she wanted. According to the doctrines of patent law, she could not stop large corporations from producing products similar to the one for which she had obtained a patent. The students' activity would have been to counsel their client about how the law would not secure for her the legal remedy that she thought she deserved.

Instead, the students probe to find out the desires their client articulated to the representatives of the patent submission firm about patenting and marketing her invention. They call upon the client to remember the repres-

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entations made to her by the representatives of the patent submission firm; they comb through the brochures and the promotional materials of the firm; they identify the actions the firm took to secure her a patent; they document the actions the client took in response to the advice of the firm's representatives. While they calculate the money that their client paid to (and borrowed from) an interconnected web of companies to obtain its "services," the students slowly decipher her motivations and reasons for committing so many financial resources over the extended course of her interactions with the firm, when she had so little ***125** money. They hear about her hopes as she took each step in her relationship with the firm. They encounter the client's religious fervor about making her invention available to other women. They discover the trust she brought to her relationship with the invention submission firm. They examine the services that the company provided in return for her money and her trust. Through the course of the representation, as the client learns about the failures, inadequacies, and deceptions of the invention submission firm, of the collusion among a web of legal entities surrounding the company, the students must address their client's disappointment, anger, and sense of injustice. They work with her to explore new ways to address the limitations of the patent that the firm obtained for her. They wonder if, as an African-American woman, she was affected by assumptions about race and gender in her dealings with the invention submission firm. With their knowledge and experience, the students in the Intellectual Property Clinic are in a position to explore how the work of the inventor, the process of invention, and financial gains from entrepreneurial effort are shaped by money, power, and access to lawyers.

The second subversive element of both clinical courses is the methodology of searching for diverse and conflicting stories. The interaction of these stories and the interplay with the construction of the official story, reveal the operation of the law. Lawyering, like legal archaeology, is about discovering, constructing, and articulating multiple stories. However, in the representation of a client, unlike in legal archaeology, the most important account is the story that develops in the relationship with the client. In the context of representing a client, the account the client wants told, as decided through interaction with the lawyer, is primary. At the center of the lawyer-client relationship is working with the client to identify, understand, and continually reformulate her different stories, particularly in light of the ways these narratives interact with legal doctrine and ethical and professional norms.

Although the story or stories of the client have a privileged status in the students' work representing clients, students, to be effective lawyers, must also discover, understand, and sometimes reconceive and reformulate the narratives of others who are part of the case. [FN31] In addition, students ***126** must discern the available, or stock stories, that underlie legal doctrines or legal practice. [FN32] More importantly, they need to learn to interpret the space that they can create or occupy for telling alternative stories. Helping a client decide whether to conform to stock stories or how far to depart from, to alter, to challenge, or to ignore these stories pervades the students' activity. [FN33] When understood this way, the work of the lawyer, whether labeled as interviewing, counseling, investigation, negotiation, making opening and closing statements, or examining witnesses, is about stories. An awareness of multiple stories drives these lawyering activities, and the accounts that are told throughout the process of representation reflect the work of the lawyer in each activity of client representation. Clinical scholars have often reframed the idea of storytelling centered on the client as "case theory" and "client theory," but both concepts have storytelling at their core. [FN34]

Returning to the domestic violence case in the Women & the Law Clinic, the students constantly use the information they obtain from the multiple sources they consult to frame different stories. In working with the client, they become increasingly comfortable with the processes that the client goes through in understanding her own experience. The students must constantly listen for how the story changes based on developments in the client's relationships, feelings, sense of self, material needs, and goals. They explore to what extent and in what

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ways the client sees herself as a victim and in what ways she feels like and acts as an agent in the world. They examine how social and legal institutions constrain women's capacity to act in the world. They are mindful of the client's understanding of the threat to her security and possibly the security of those she cares about. They consider the client's views of the person who was violent to her. Is ***127** he a perpetrator? A companion? A monster? A father to her children? A victim himself? A provider? These multiple, sometimes conflicting, characterizations of self and others come from not only a woman's own experience, but also the prevailing images of men and women in situations of domestic violence. As the students counsel the client about the possibility of filing a court action, they gauge how the narratives that dominate the court system and social service systems will interact with the story the client wants to tell. And they must discover the story that the person who abused her will probably tell. They formulate a story to present to the court. As in legal archaeology, the students' search for these diverse stories is central to the law. In the identification and articulation of these disparate and conflicting narratives, students see law in the making.

In the Intellectual Property Clinic, students similarly search for multiple stories about their client's experience of seeking and obtaining a patent for her invention. They, like the students in the Women & the Law Clinic, must be aware of their client's shifting perceptions of herself and others. She is proud of herself as a creative person. When she sees products on the shelves of the supermarket similar to the one for which she obtained a patent, she is indignant that large corporations are making money from an invention she believes she developed before they did. She thinks that her invention would have helped other women. She sees her work as part of a religious mission. She wants to believe that the people at the invention submission company meant to help her. She is disillusioned by the misrepresentations they made to her, and she is dismayed by the company's failure to obtain anything of value for her. She is angry that they took so much of her money. She is embarrassed about being misled. She is angry at their betrayal of her. She is outraged at being manipulated and exploited by a large and complicated company that systematically took advantage of the dreams of inventors with few resources. She wants to help others who may be similarly harmed.

While discovering their client's shifting stories, the students also seek to know the multiple accounts of the invention submission company. Is it a legitimate enterprise attempting to make complex and highly technical services available at a reasonable cost to ordinary people who would not on their own be able to obtain help in protecting and marketing their products? Is it a sleazy operation in league with other operations, preying upon vulnerable people who do not have much income beyond what they need to live? Are they creative entrepreneurs who have identified a need in the market for patents and have filled that need? Have they behaved honorably by following the laws designed to protect consumers? Did they fully disclose to the client that she was unlikely to make money from her invention? If so, does that disclosure constitute sufficient openness? Have they "cleaned up their act" by complying with a consent decree they ***128** entered several years earlier? Or have they interpreted every requirement as narrowly as possible in an attempt to continue to induce people to buy worthless services?

As in the representation of a client in a situation of domestic violence, the students who represent the woman with the patent encounter and construct and respond to diverse and conflicting stories. The interaction of the conflicting stories about a woman, a patent, and a company comprises critical information about the law of patents, information excluded from the doctrines of the law. When the students comprehend the official account of patent law within the context of these conflicting stories, they know the law differently. The doctrines regarding the nature and scope of patents are neutral, seemingly equally accessible to all. However, in the multiple stories of the client and in the conflicts of the client's stories with the stories of the invention submission company, the students confront how the formal doctrines of patent law erase an understanding of how patents are

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realized and given effect in the world, depending upon the position and resources of the individual seeking a patent.

Third, both clinical courses mirror the subversions of legal archaeology by reshaping the content of legal knowledge. When students listen to the shifting stories of their client and of others; when they frame and reframe stories; when they see how the stories interact with each other; when the students develop their capacities as lawyers to affect those stories; when they analyze the possibilities of and limits to gaining acceptance of some of those stories; when they see the power that operates as some stories are elevated over others; and when they explore how legal doctrine can be transformed within the legal system to produce results in tension with those intended, they learn law in a subversive way. In experiencing how the stories people tell are connected to their different relationships to the legal system, they gain an understanding of how the law operates. Because the stories are frequently complex, chaotic, inconsistent, and ambiguous, the law is difficult to grasp. Nonetheless, these stories reveal the law as experienced, the law as mediated through legal and social institutions, and the law as connected to the exercise of power. Without the lawyer's constant attention to stories in the present life of a case (or without the legal archaeologist's efforts to uncover those stories in the cases of the past), the law appears as an abstract pronouncement, distinct from the clash of stories, the disputes among people, the conflicts among groups, the activities of social movements, and the exercise of power.

When students in the Women & the Law Clinic look outside the official story about domestic violence, they experience how focusing on the substantive and procedural aspects of civil protection orders constricts their legal knowledge. The legal rules, procedures, and remedies alone often fail their client, as they embody limiting and sometimes damaging assumptions ***129** about women's experience of violence, do not embrace the range of effects that violence has in women's lives, and can expose women to greater danger than they faced before seeking or obtaining an order. The students also face the operation of power as they come to know the meaning of violence in the woman's life. The students feel the consequences of the choices they make with the client in constructing stories and in handling conflicts in the stories.

These consequences come in many forms. If students do not hear their client's story in a way that makes her feel comfortable or if they distort her story, she may abandon legal actions that might otherwise help her. If they frame her story too narrowly within the confines of existing legal categories, the client may seek through the court system relief that she would more safely and effectively obtain elsewhere. If the client decides to proceed with a court action, the students face the exercise of judicial power. The choice of stories is, at the moment of decision, not just about narrative or history. The choice affects whether a client seeks and/or gets the relief that the legal system offers, whatever its limitations and distortions. Therefore, students immediately and concretely experience the effects of consulting multiple sources, framing stories, and analyzing the conflicts among the amalgam of narratives. The materials that they consult throughout their representation and the stories that they encounter and shape enable them to comprehend the law of domestic violence as one arena for contemporary struggles over how a woman can achieve not just meaningful safety, but also the capacity to participate fully in relationships and in society, free from oppressive constraints such as systematic violence.

As students represent other women in the clinic in other types of legal actions, and as they approach their work with all their clients in a similar fashion, they also begin to relate the mixture of stories in those cases to the stories in the original domestic violence case. Students may not emerge from a year in the Women & the Law Clinic with a well-developed understanding of how the multiple stories in the different spheres of women's lives intersect with each other, but they do begin to appreciate how law is a site for contesting the numerous ways that women in many different situations continue to be excluded, constrained, discriminated against, and

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oppressed, depending upon their particular position in society. With this vision of law, students are better able to see themselves as capable of acting as lawyers to help women who must fight against the official accounts contained in the legal system or want to use the legal system or other social institution to reshape possibilities in their own lives or in the lives of other women.

Students in the Intellectual Property Clinic, by looking outside the official story about patents, also realize that they must approach patent law ***130** from outside its doctrines in order to understand how it operates. Patents are accessible to inventors who occupy privileged positions in society. The students find out how a patent is only one element in making an invention valuable in the world. Resources and economic organizations are also needed. They become conscious of the space for exploiting vulnerable people who do not begin with power or resources for obtaining and benefiting from the rights that the legal rules of patents create. They begin to comprehend one woman's impulse to invent and have others benefit from her invention. When they recognize the partial and distorted quality of the dominant stories about inventors and the process of invention, they question why those stories conflict with the experiences conveyed to them by their client. The students wish they knew more about how gender and race affect the experience of their client, and how the world of invention and the activities of production and marketing of inventions are marked by race and gender.

As students represent other clients who want to protect or to use those cultural products that are labeled as "intellectual property," they discover multiple and conflicting narratives about the process of cultural production. They encounter writers, artists, dancers, computer programmers, historians, archivists, scientists, librarians, music enthusiasts, journalists, and social activists, as well as inventors, who engage in the creation of "intellectual" works and in the use and dissemination of the products of our culture for many purposes. The students hear and construct many conflicting accounts of how these activities benefit society. The multiple stories, in conjunction with reflection upon those stories in the clinic class, enable the students to begin to see the forces shaping contemporary concepts of intellectual property. Individuals differently situated regarding intellectual work, powerful societal forces that generate and profit from the creation of cultural products, and people who enjoy and value the products of culture create complex, ambiguous, and conflicting stories about the values implicated by the process of cultural production. With this knowledge and experience, students begin to perceive the law of intellectual property as embracing the sphere of cultural production.

These three subversive elements of clinical pedagogy, which also characterize legal archaeology, all require exploring the nature and contours of factual indeterminacy. Understanding factual indeterminacy is as critical to the project of lawyering [FN35] as it is to legal archaeology. As students in a clinical program come to appreciate the complexity, ambiguity, and instability of the facts of any case, as well as the constraints and the possibilities that characterize the construction of facts, they realize ***131** how law is fraught with factual malleability. Facts are not just given in the world for the law to act upon. Rather, facts are embedded in situations, institutions, and relationships. Seeing them, hearing them, finding them, and interpreting them are parts of the larger project of understanding the context in which they arise. Lawyers also daily confront limitations on the malleability of facts. Part of the material world, facts are only partially indeterminate, yet they are perceived, experienced, and understood differently by different actors in the world. Therefore, students in a clinic face at once both the boundaries created by the facts they encounter and the shifting and variable nature of those boundaries. These characteristics of facts are not incidental to the development of law. Rather, the contexts within which facts appear and are understood are part of both an individual case and the dynamics that shape the development of legal doctrine and law. In both clinics, understanding factual indeterminacy as part of and not separate from law undermines the concept of law as authoritative pronouncement.

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In the three pedagogical activities presented in this panel, challenging the idea of law as authoritative pronouncement is part of current feminist subversive activity. Although official pronouncements may not always be about women or may not always implicate questions of gender, the process of reshaping the concept of what constitutes law is important to feminist legal theory. As the stories of the law, in their multiplicity and ambiguity, are revealed, analyzed, and studied in law school classes, our students and we are can better understand how gender operates in apparent and invisible ways throughout the law. We have learned much from analysis of the gendered assumptions underlying authoritative texts. We have explored the contradictions and ambiguities that are inherent in those texts. Now, by attending to the conflicting stories that constitute the law, as found in sources outside of official pronouncements-- especially those alternative stories that have been rejected or distorted--we have much to discover about the experiences of women as the law pervades their lives, much to examine about the operation of power as expressed in the authoritative stories that dominate the law, and much to explore about the possibilities for and limitations on transformation through the stories that we tell in seeking to change the law.

[FNa1]. Professor of Law and Carrington Shields Scholar, American University, Washington College of Law. I thank my colleagues in the clinical program at the Washington College of Law who constantly embrace expansive visions of the project of clinical education. In particular, I appreciate the creativity and openness of the colleagues with whom I have worked so closely in the development of the Women & the Law Clinic and the Glushko-Samuelson Intellectual Property Clinic: Diane Weinroth, Vivian Hamilton, Peter Jaszi, Christine Farley, Vicki Phillips, Joshua Sarnoff and Richard Ugelow.

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[FN6]. Threedy, supra note 1, at 128.

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[FN9]. Feinman & Feldman, supra note 1, at 882; Gordon, supra note 1, at 391.

[FN10]. Cain & Kerber, supra note 1, at 102; Grodin, supra note 1, at 548.

[FN11]. Professors Cain & Kerber share my perception of students' reluctance to seek knowledge beyond traditional legal sources. Cain & Kerber, supra note 1, at 102. Perhaps the students are not so dissimilar from many of their teachers. Gordon, supra note 1, at 391.

[FN12]. Even students who embrace legal perspectives that would seem to require knowledge and analysis from beyond legal texts, such as law and economics, frequently tend to rely on the official pronouncements about how those materials should inform legal decision making. See Gordon, supra note 1, at 391-92.

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[FN14]. Id.; see also Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2480-81, 2485-88, 2495, 2514 (1993) [hereinafter Cahn, Inconsistent Stories].

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[FN16]. Threedy, supra note 1, at 133-34.

[FN17]. Cain & Kerber, supra note 1, at 91, 95-97, 102-03.

[FN18]. Id.

[FN19]. Id. at 91.

[FN20]. Id.

[FN21]. Id. at 91.

[FN22]. The Women & the Law Clinic is a two-semester, fourteen-credit course in which students represent clients in a wide variety of legal actions, while simultaneously studying the theory and practice of lawyering in a seminar organized around simulated cases that draws on readings about lawyering and about the operation of gender in the legal system.

[FN23]. The Glushko-Samuelson Intellectual Property Law Clinic is a two-semester, fourteen-credit course in which students represent individuals and groups in matters involving intellectual property and examine how legal categories that construct intellectual property have an impact on the public interest.

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[FN25]. Although many law schools continue to define their clinical courses as "skills" courses, this vision of clinical education has been consistently challenged. For a fuller discussion, see Ann Shalleck, Toward a Jurisprudence of Clinical Thought 20-24 (paper presented at the Robert N. Endries Distinguished Faculty Workshop Series, April 12, 2002, manuscript on file with author) [hereinafter Shalleck, Toward a Jurisprudence]; see also Bryant & Milstein, supra note 3, at 1203-06, 1208, 1215-16; Chavkin, Spinning Straw into Gold, supra note 5, at 132.

[FN26]. Amsterdam, The Lawyering Revolution, supra note 1, at 12; Gerald P. Lopez, The Work We Know So Little About, 42 Stan. L. Rev. 1, 9-11 (1989); Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1608 (1989) [hereinafter Lopez, Reconceiving Civil Rights Practice]; Gerald P. Lopez, Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education, 91 W. Va. L. Rev. 305, 322 (1989); Chavkin, Spinning Straw into Gold, supra note 5, at 133; Shalleck, Toward a Jurisprudence, supra note 25, at 15-20; Shalleck, Constructions of the Client, supra note 1, at 1744-46; Lucie White, Paradox, Piece Work, and Patience, 43 Hastings L.J. 853, 855 (1992); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 45-50 (1990) [hereinafter White, Subordination].

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[FN33]. Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769 (1992); Cahn, Inconsistent Stories, supra note 14, at 2485, 2516-18, 2524-26; Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 556-62 (1992); Lawrence, supra note 31, at 2253; Kim L. Scheppele, Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits and the Revision of Truth, 37 N.Y.L. Sch. L. Rev. 123, 167- 69 (1993); Schultz, supra note 31, at 145-46; White, Subordination, supra note 26, at 46-52.

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AALS Contracts Transcripts

***717** TEACHING INTELLECTUAL PROPERTY LICENSING TRANSACTIONALLY

Llewellyn Joseph Gibbons [FNa1]

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GOOD morning. My name is Llew Gibbons, and I am an associate professor of law at the University of Toledo College of Law. Actually I'm a ringer here. I am not sure where my first year Contracts professor is: above or below. But wherever Professor Bob Hallgring is, I am certain that he is surprised and pleased that I have the honor of being invited and the chutzpah to accept your kind invitation to address the Contracts Section of the American Association of Law Schools. [Laughter.]

I said that I am a ringer. I do not teach contracts or commercial law. But I do teach an upper-level course in which contract law is instrumental. I teach in the areas of Intellectual Property, Cyberlaw, and Ecommerce. The latter two are courses that are largely defined by contract law. But, I am here today to discuss the first area, intellectual property. I have the privilege of teaching Intellectual Property Licensing and Management as an upper-level, capstone course. First, my students should have taken at least the core intellectual property courses such a Copyright, Trademark, and Patent. As a faculty member who is lucky enough to be downstream of the first year Contracts faculty, the students taking my Intellectual Property Licensing course have had common law contracts and, in theory, have had U.C.C. Article 2, some familiarity with Article 9, and a smattering of bankruptcy. So they have a substantial knowledge base on which I can predicate my course. This permits me the luxury of focusing on the application of legal theory and teaching the skills to isolate legally relevant facts rather than teaching theory and applying the law in sparse, pared down factual context.

Before I proceed further, I would be remiss not to thank all of you who teach contract law. Because of the extraordinary skill and outstanding efforts of the faculty teaching in first year Contracts and upper-level commercial law courses and the work of the authors of the wonderful casebooks that facilitate learning contract law and commercial law, I am able to teach the finer points of intellectual property management and licensing without returning to the core concepts of contract law. [FN48]

By the finer points, I mean those substantive and procedural points where the adjective law of contract intersects with what, is from my perspective, the substantive law governing intellectual property and the background noise of negotiations, business decisions, and federal and state regulations, all of which confound the perfect unambiguous text embodying the agreement of the parties that ***718** is susceptible to one and only one meaning by any interpretive community without resort to outside exegeses. I am of course still waiting for a student to produce this platonic ideal contract.

In intellectual property licensing, we use contract law to allocate property rights created by statute or the common law or to opt-out of the default rules established by statute or the common law. If the law is unclear, we may even use contract law to create a cohesive regime to create and to allocate rights. [FN49] Computer software is a good example of this. The legal status of computer software under intellectual property law was unclear despite its significant role in modern, information driven, post-industrial revolution economies. Scholars and practitioners pugnaciously debated whether software was copyrightable under § 102(b) of the Copyright Act

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which, excludes "procedure[s], process[es], system[s], method[s] of operation ...." The status of software under patent law was equally cloudy because abstract ideas and mathematical algorithms were not patentable subject matter. [FN50] What is a computer program but a mathematical algorithm or an abstract set of instructions? Software at first blush fitted in the core definitions of unprotectable subject matter. So, the markets demanded and law schools produced creative lawyering to solve this conundrum. If software was neither copyrightable nor patentable, an attorney looked to the law of trade secret, which is largely contractual, and developed contracts to provide to the degree possible similar protections to those provided under copyright or patent law. In fact now for most mass-market intellectual property licenses, the statute is the floor, and copyright owners contract for substantially more rights than are granted in the statute creating the initial property interest.

The Intellectual Property Licensing and Management course at the College of Law is ambitious. We strive to review the basics of intellectual property, basics of contract law, new forms of contract such as the mass-market license (standard form contract) and the Uniform Computer Information Transactions Act (UCITA), negotiation theory, and to place the process into a larger business context. This requires that we use a sufficiently complex hypothetical. Nothing is more complex than the real world. So, I try to identify two small companies with well-developed websites. I look for websites that provide information that would be useful in negotiating a license and ignore glitzy websites that focus solely on sales. Once I narrow it down to a few candidates, I do some basic research on their intellectual property portfolios. Both companies should have patents, copyrights, or trademarks, or other opportunities to meet mutually beneficial exchange. I then invent a hypothetical fact pattern for each company that does not stray very far from the truth as publicly revealed in public filings, the company website, or similar places. In my hypothetical fact patterns, there are numerous opportunities for the two parties to reach an agreement. Of course, in addition to the public hypothetical, each party gets secret instructions. I then randomly assign the students to two groups.

For the sake of this discussion let's name the two companies ACME and COYOTE. [FN51] ACME and COYOTE both have intellectual property assets that may ***719** be used to create a new product. In terms of resources, they have the entire world. I expect them to go and research--if you're the Acme people, I expect you to research Coyote's patent, copyright, and trademark registrations with the Library of Congress or the United States Patent and Trademark Office respectively. I expect them to be looking at the various SEC filings, the various filings with the relevant secretary of state, such as U.C.C. Form 1. As the client, they are always free to email me questions, which I usually answer, but often will refer them to a published resource or suggest that the information should be learned during the negotiation process.

I believe that in a traditional contracts or commercial law course, the focus is on whether the document is legally complete to accomplish whatever it purports to accomplish. At times, traditional contracts courses may look behind the document to the circumstances under which the contract was formed. But other than Article 9, contract law professors and their students seemed disinterested, uninterested, and perhaps agnostic on the need to verify that the parties to the contract owned the subject matter of the contract. The difference on how we approach contracts in this course is that here like in Article 9, we are vitally concerned with ownership; and because intellectual property rights are intangible, we are concerned with prior contracts granting rights in the property. We are also concerned with the financial stability of the future business partner. These issues come into play in drafting the contract to determine how risks and responsibilities will be allocated and whether supplemental insurance may be required to guarantee any indemnity clause(s).

After the students have done their initial opposition research (and substantial research on their client), I ask them as a group or individually to draft a pre-negotiation memorandum for me. The pre-negotiation memor-

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andum should address the goal of the negotiation, principles behind selecting the goal, and strategies to achieve that goal. As this process of schema, correction, and negotiation planning takes place, my course is ongoing in terms of substantive knowledge. I hope that I am imparting substantive knowledge as to intellectual property law, contract law, or sound business practices that will affect the on-going process that is finally embodied in the license.

I view my role as facilitator to encourage the student's own creativity. I am always prepared to add more facts or to clarify a fact, if it is the sort of question a client would answer and not a legal question that they should research on their own. I generally do not view myself as a referee, but if I have to intervene to assure professionalism or ethical behavior on the part of any student or team, I will impose severe sanctions. I stress professionalism not only in its technical meaning, but also professionalism in a broader sense of common courtesy and respect to their client, team members, and opposing counsel. I tell them that you will soon be lawyers, and you have to be able to resolve these conflicts, from scheduling to discourteous behavior. I am prepared to provide more information in terms of the clients' needs, but I will not referee disagreements between the two law firms. And, it works.

As we proceed with the license negotiations, we are still covering substantive intellectual property licensing law, and the students are meeting as "law firms" on their own time to work on the final license. The ongoing substantive lecturers add ***720** "new" or at least previously unconsidered material to the negotiations. For example, prior to classroom discussions, students do not tend to think about the appropriate business entity to undertake the transaction. Do they want to create a joint venture? Clearly, how the deal is structured raises tax, business, and legal issues.

Eventually I suggest to the students that it may be more efficient to break up their law firms into smaller, more manageable groups and to assign one or two students to each group. Each group is then responsible for negotiating an individual section of the overall license agreement. What I have found fascinating is that each group will define terms differently rather than agreeing on a master set of general definitions. "Time" is the best example. Time for each section of this contract will be defined differently. The royalty section will define a time differently from the production section, and both are different from the section defining the duration of the license. Whatever section you read defines a "day" differently. Sometimes weekends and holidays count, sometimes they do not. In essence, each section has its own definition section, which may conflict with the definitions used in other sections.

After the small groups finish their individual sections, collectively the groups then are supposed to merge them into a license. I then get only a definition section that a lawyer could love. "A day for the purposes of section I(a)(ii) means 24 hours but does not include legal holidays but does include weekends unless the legal holiday is a Friday or Monday. A day for the purposes of section II(b) shall include all weekdays ...." We collectively work through this in class--I note portions that I find confusing, inconsistent, illegal, immoral, or unconscionable, as well as those sections that may not represent sound business judgment. Finally, we negotiate. I often ask the individuals who negotiated a section questions such as "Why do you need this definition of time?" I find out the individual students who negotiated the individual definitions of time for their section are wedded to it. They will actually fight against their "own law firm" in order to assure that their definitions make it into the final agreement, sometimes even if the negotiated language may not represent their client's best interests.

Students are wedded to their language. So I ask, "Why are you wedded to this language?" As contract law professors, you will not be surprised by the answer. The most popular answer is that "I found it in this form

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book, and this form book is wonderful." [Laughter.] Or, "I did similar contracts five years as a paralegal or business professional, or I intern downtown for a law firm and this was the language they use." With honest interest and confusion, I ask, "What do you gain? What do you lose? What's going on here?" To which many students respond, "I don't know." When I ask, "How does it advance my interest as a client?" an honest student once told me, "I don't know, but I really like this language."

We go through it line by line, word by word, striving for the ideal unambiguous agreement or a least the internally consistent agreement. This requires us to discuss what each party intended in class--and we often discover there was no meeting of the minds. The students who did not participate in drafting the clause under discussion are often willing to chime in why the clause is ambiguous or may be interpreted in a manner other than as the negotiators intended. With this is done, my students breath a sigh of relief; and we go on to analyze the contract in the larger business context.

***721** I go back and say, "By the way, you realize intellectual property, like livestock, frequently creates new intellectual property. How are we going to allocate these new forms of intellectual property? Let us say in the course of doing our joint venture, a new patent issues, a new copyright, or a new trademark. Who owns those things? For what duration? Copyright is currently, for a corporate works of authorship, up to 120 years, and life plus 70 for natural people. Patents last for twenty years. Trademarks are potentially forever. We have to go back and consider these new forms of intellectual property." All of a sudden they realize, "Wait a minute. We're creating new relationships. We're creating new property. We need to start allocating rights in this property." As the eternal cynic, I also have to remind my students that "breaking up is hard to do." At the end of this process in theory, we have this wonderful contract. It is wonderful in the sense that it is complete insofar as there are provisions that theoretically cover the relevant possibilities under consideration.

And then we go through it again, line by line, item by item. That is when we realize that some clauses do not necessarily or accurately memorialize the intention of the parties. Now we have both sides thinking does this definition accurately memorialize our intention, using terms like "best good faith efforts?" I ask my students, "Do you really want to use a term like 'good faith efforts,' or do you want to maybe have an operational definition? Can both parties agree that "good faith" really means a minimum of 10,000 units per year?" Again, we keep going back and forth. Students tend to like abstract concepts and legal language like "good faith" and "fair dealing." I believe that business people are from Missouri, the "Show Me" state. So while I like good faith and fair dealing as much as anyone else at the end of the day, my client and I know whether 10,000 units were produced; we do not know if there was good faith or fair dealing. Further, I believe that under many contract regimes "good faith" is required, presumed, and read into every contract, so why write it in as an express term if the law presumes it and a judge will demand it?

Then we go through it again. We keep slogging through. "By the way, what are the antitrust implications of this? For example, royalties paid in excess of the life of a patent are according to an old Supreme Court decision as a per se violation of the Sherman Act." So, we go back and restructure the royalties to expressly consider this issue. We restructure our royalty rates so we can allocate part to the trade secret element, part to the know-how, and part to the patent. The result is that at the expiration of patent the royalty rates are clearly being paid for know-how, which still exists and justifies continued royalty payments.

Every time they are convinced we have a deal, something else comes up. And if they don't pick it up on their own, during class I "accidentally" tell a war story which at least one student will pick up on.

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My course is heavy on class participation. I think the final memo is worth between 60 and 70%. In terms of the final grade, each student takes the final contract, and they write a post mortem. I require each student personally to go through every line and every clause. They will state where they agree or disagree with their colleagues. If they disagree with the contract language, they must state and describe how they would change it, and how their preferred language would improve the contract. If they agree with the contract language, I want to know why ***722** and how this accomplishes their client's goals. In theory, each student has read, written, and analyzed a contract. They have researched the legal and factual questions relevant to the contract. I hope that my students understand the intellectual property, contract, choice-of-law, business, tax, and other issues involved in an intellectual property licensing agreement. But, one of my major hopes is that my students no longer defer their professional judgment to form books but rather be proactive professionals who use form books and guides as mere suggestions to incorporate into their work product.

In closing, I would like to give one person's perspective as someone who only teaches upper-level courses. I have a wonderful dean and associate dean who permit me to teach courses that I love to upper level students. My students self-select to take licensing based on personal interests or career goals. No one has to take a course from me, so most of my students are there either because they care about the subject matter or, as one student told me, "Professor Gibbons, you are less boring than [another professor teaching at the same time]." Every so often, my ego needs a grounding in reality. [Laughter.]

But, I am very lucky that I can rely on faculty such as yourselves to cover the basic doctrines of contract and commercial law. Every so often, I will make a statement about contract or commercial law. My students will look at me quizzically, and I will ask, "Don't they teach X in first year Contracts anymore?" So far, my students have sworn on a stack of Bibles they do not teach consideration, offer and acceptance, or U.C.C. 2-207. [FN52] I have had an entire class that claimed it is black letter law that standard form contracts are per se unenforceable as contracts of adhesion and, therefore, unconscionable. Since it has been a few years since I last studied Contracts, I wander into my colleague's offices and ask about the lacuna in contract education. All my Contracts colleagues have very detailed lecture notes for just such an occasion, and they tell me that "I taught § 2-207 on March 27th at ...." And then I say, "Really?" But then I too am humbled by what my students claim that I have not taught or by what they either little noted or long remembered. I have just finished grading my exams, and I know there are many things that I have taught for which I now have a number of students with a stack of Bibles swearing that I have never mentioned. Thank you.

[Applause]

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[FN48]. On a personal note, I would like to thank Beth Eisler, Lee Ann Pizzimenti, James Tierney, Bruce Campbell, and the other University of Toledo College of Law faculty and adjunct faculty, who teach first year Contract Law and the many Commercial Law course offerings, and without whose regular advice, I would be totally lost both in terms of teaching these topics as part of my substantive area of teaching and for their assistance in incorporating these topics into my cyberlaw and ecommerce scholarship.

[FN49]. Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 96 n.7 (3d Cir. 1991).

[FN50]. Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

[FN51]. With apologies to Coyote v. Acme, Ian Frazier, THE NEW YORKER, Feb. 26, 1990, available at ht-

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tp://beebo.org/smackerels/coyote-v-acme.html.

[FN52]. U.C.C. § 2-207, dealing with the "battle of the forms," is notoriously opaque.

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