Patent, Trademark, & Copyright Law

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– Overland Park, Kansas
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Intellectual Property Jurisprudence

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Agenda

- Historical Perception of IP;
  - Advancement of Society
  - Reward the Innovator/Artist ... Encourage Investment.. Society is better

- Current Perception of IP
  - Unfair
  - Stifle Innovation
  - Hurt Society
  - Steal from Corporations

- Internet jurisprudence and its interaction with Intellectual Property jurisprudence.
  - Investigate/Research
  - Direct to consumers / Businesses
  - Instant world wide access
  - Electronic Media > quality & easier
    - Artwork/Media/Movies/Content
Historical Foundations

- Patent Law
- Copyright Law
- Trademark Law
U.S. Constitution – IP Clause

- Congress’ power to legislate patents and copyrights - Article I, Section 8, Clause 8:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
Framers’ Intent – IP Clause

Madison’s view of the “IP Clause”:

“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.”

See The Federalist No. 43.
Timeline of e-business

- Before 1900’s – Mom and Pop
- 1920s – M&P and Department stores
- 1922 – Plaza - First shopping center
- 1929 – Super market and shopping malls
- 1941 – Convenience stores (7-11)
- 1962 – 1969 Arpanet conceived
- 1962 – Walmart opens
- 1971 – Arpanet connects Univ and Gov’t
- 1975 – Bill Gates and Paul Allen found MS
- 1976 – Steve Jobs and Steve Wozniak found Apple
- 1982-1987 – TCP/IP created – Internet born
- 1988 – Internet is essential communications tool (email)
- 1991 – The World Wide Web is born using words and pictures...
- 1995 – Commercialized internet – AOL/Compuserve and Prodigy
- 1999 – Retail Sales hit 3 trillion...
- 2003 – Weekly online retail sales reach 2 bill. (>25% since 2002) … still growing
Figure 1 Forecast: US Online Retail Sales, 2009 To 2014

US online retail sales will reach $248.7 billion by 2014

<table>
<thead>
<tr>
<th>Year</th>
<th>US online retail sales* ($ billions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$155.2</td>
</tr>
<tr>
<td>2010</td>
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<td>2011</td>
<td>$191.7</td>
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<td>2012</td>
<td>$210.0</td>
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<tr>
<td>2013</td>
<td>$229.8</td>
</tr>
<tr>
<td>2014</td>
<td>$248.7</td>
</tr>
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</table>

% of total US retail sales

<table>
<thead>
<tr>
<th>Year</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>6%</td>
<td>7%</td>
<td>7%</td>
<td>7%</td>
<td>7%</td>
<td>8%</td>
<td>8%</td>
</tr>
</tbody>
</table>
Figure 2: Forecast: US Online And Web-Influenced Retail Sales, 2009 To 2014

US online and Web-influenced retail sales
($ billions)

- Web-influenced retail sales
- Online retail sales

<table>
<thead>
<tr>
<th>Year</th>
<th>Web-influenced</th>
<th>Online</th>
<th>Total Sales as a % of Total Sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$917</td>
<td>$155</td>
<td>42%</td>
</tr>
<tr>
<td>2010</td>
<td>$1,021</td>
<td>$173</td>
<td>46%</td>
</tr>
<tr>
<td>2011</td>
<td>$1,115</td>
<td>$192</td>
<td>48%</td>
</tr>
<tr>
<td>2012</td>
<td>$1,213</td>
<td>$210</td>
<td>50%</td>
</tr>
<tr>
<td>2013</td>
<td>$1,312</td>
<td>$230</td>
<td>51%</td>
</tr>
<tr>
<td>2014</td>
<td>$1,409</td>
<td>$249</td>
<td>53%</td>
</tr>
</tbody>
</table>

Source: Forrester Research Web-Influenced Retail Sales Forecast, 12/09 (US)
Pre-internet IP

• Before internet .. (we lived in the dark ages)
  – Format...Reel, vinyl and cassette – hard to copy
  – Format...Paper books – copies usu bad quality
  – Research...Encyclopedias, microfiche...library
  – Research....use telephone
  – Time... wait for mailman to deliver
• Electronic copies of media/documents (= orig)

• Instant access to petabytes of data
  - Google, Amazon, MS and Facebook = 1200 petabytes = 1,200,000 tb (1tb = 1000gb)

• Billions of downloadable Movies, Books, Pictures and Songs
• Without IP
  – Technical commands (like ftp)
  – Numbers
  – News (no graphics), and
  – Email

• With IP
  – What we see today..multi media GUI based platform for use by everyone
Rise of the Troll

- With the rise of the internet came file sharing sites like Napster/Limewire/Torrent
- RIAA
  - With the file sharing sites taking hold, music sales plummeted. To combat falling shares, RIAA sued over 30,000 customers including children, grandparents, single moms and college students.
  - Not good PR
NTP v. Blackberry (RIM)

- Inventor Thomas Campana Jr. built a company from early 70s focusing on wireless technology. After receiving 50 patents, his company collapsed into bankruptcy.
- Partnered with Lawyer Stout to form NTP to manage patent portfolio... solely to license inventions.
- In 2000 offered to license for approx. $1mill... Blackberry refused.
- 2002 verdict: $53 million, ongoing royalties and injunction.
- Appeal... settlement in 2005 for 450 million ... But fell apart
- On eve of shutdown...March 2006 settled for 612.5 million
“Attack of the Trolls”

• Traditional:
  – Ugly, mythical cave-dweller camped out on a bridge.
  – Collects a toll from anyone who attempts to cross the bridge.

• IP:
  – Fails to put registered intellectual property into practice. NPEs
  – “Magically” appears demanding $ or threatening litigation when unsuspecting producers use registered work.
Copyrights

- Original work of Art
- Fixed Expression
- Does not protect ideas, only tangible expression of ideas
- Non-Functional
- Transferrable whole/part
Myth #1

Copyright trolls are aggressive and opportunistic, enforcing their copyrights through wasteful litigation to make money.
Fact #1

Global music piracy cost annually:

- $12.5 billion economic loss
- 71,060 U.S. jobs loss
- $2.7 billion workers’ earnings loss
- $422 million tax revenue loss
- $291 million personal income tax loss
- $131 million lost corporate income & production taxes.

Source: Institute for Policy Innovation.
Copyright Trolls

- Internet Piracy → adult film downloads monitored (Prenda)
- Fashion Industry → copyrighted fabric designs sold online or in trade shows
- Photography → copyrighted photos “borrowed” by web designers and social media users (Twitter’s @dog_rates)
Trademarks

• Enables companies to differentiate their products
• Basis for building consumer brand image and reputation
• Encourage companies to invest in maintaining product quality
• Valuable business asset
• Licensed to provide a direct source of revenue through royalties
• Critical part of franchising agreements
• Collateral for loans
Myth #2

- **Trademark trolls** register a mark with no intention of using it in commerce and extort money from “infringers” by threatening to sue them. Reform is needed to protect unsuspecting companies.
Fact #2

- Trademark Law:
  - Requires intent to use a mark, so entities asserting infringement are using the mark in commerce.
  - Precludes registration of generic marks.
“Trademark Troll” – Leo Stoller

- Chicago-based “intellectual property entrepreneur”
- Sold use of his claimed trademarks on website Rentamark.com
- “STEALTH” Troll
- Movie, fishing gear, boat, & sports equipment companies “infringed”
- 2005 – “infringement” suit against George Brett’s company for selling “Stealth” baseball bats.
- N.D. Ill. found no consumer confusion and Brett’s “Stealth” claim was senior, cancelled Stoller’s registration, noting his 49+ filings with the court.
- Sanctioned by USPTO TAAB, N.D. Ill., 7th Cir., and the U.S. Supreme Court.

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Patents

- Protection of new and useful inventions.
- Must disclose sufficiently to create the balance.
- Granted for a limited period of time.
- Exclusive + Monopoly + Negative Right, NOT an Affirmative Right to Practice.
Myth #3

• **Patent trolls** register patents for unreasonable terms and enforce them against companies who actually contribute to society by producing goods and/or supplying services. Reform is needed to protect these companies.
“The Myth of the Wicked Patent Troll”

The Ballad of the Patent Troll

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Question...

Does our current system really hinder innovation?

Or, does it hinder corporations from making more money off of an individual’s intellectual property?
Fact #3

- Cisco spent **$13 million** in attorney fees to fight Innovation IP Venture’s patent infringement.
- The patent turned out to be worth 10 cents per device.
- Legal fees outstripped the settlement amount fivefold.
- Most small startups and entrepreneurs do not have **$13 million** to defend their patents.
“Need” for Reform?

- One theory is that Big Money is behind the “attack on trolls” and the push for patent reform.
- Major corporations frequently license patents from patent owners in the manufacture of products – cell phones, laptops, etc.
- Politics involved in the use of patented technology – corporations lobby for patent reform to avoid “wasteful litigation.”
- Compensating inventors and protecting their inventions inhibits innovation and technology?

Small Inventor v. Big Money

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The Small Inventor

• Reform activists: patent holders block innovation because they are non-practicing entities profiting from practicing entities.

• “Inventor” is not synonymous with “Marketer” – think of the engineers you know.

• Great inventors of the 19th Century were “non-practicing entities” by nature.

• Engineering patent holders were often university professors.

• Agricultural advances were frequently patented by farmers.
Good Trolls vs. Bad Trolls

• Some Trolls or NPEs are backed by:
  – hedge funds, VC groups, pension funds, blue-chip tech companies, IP attorneys and wealthy investors...

• Some are Angel Investors

• Some do research and development
Patent Troll Aftermath

“In response to the wave of patent troll cases, we have changed our business practices. In the past, we might have considered licensing technology from a small inventor, a few guys in a garage who are putting together a very exciting idea about technology. But now, we often do not license that technology because we are concerned that that inventor, that startup, may not have the wherewithal to defend and indemnify us in a patent troll case. And I think that is a very unfortunate thing for innovation in general.”

- Janet L. Dhillon
  Executive VP, General Counsel & Corporate Secretary
  J.C. Penney
“Wasteful Litigation”

- Patent-reform activists: 60% increase in patent lawsuits since 2000 indicates a need for patent reform.
- Counter: The Internet has increased awareness of infringement.
“Public good” or hindrance to innovation?

President Obama’s 2014 State of the Union Address:

“...let’s pass a patent reform bill that allows our businesses to stay focused on innovation, not costly and needless litigation.”
Patent Reform Legislation

- America Invents Act (AIA)
  - “1st inventor to file” replaces “1st to invent” system (w/specified exceptions).
  - Pleading & disclosure requirements for patent infringement actions.
  - Pre-suit notifications must meet certain standards before used as evidence of willful infringement.

- Innovation Act
  - Proposed, but stalled.
  - Would require further specificity about infringement claims, making vague claims harder to file.
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