

# Rethinking Intellectual Property: History, Theory, and Economics

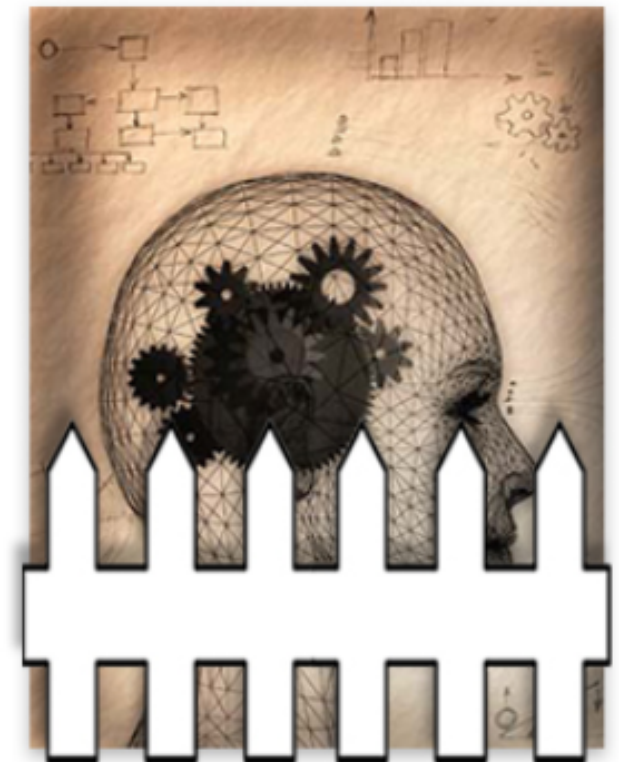
## IP Statutes and Treaties; Overview of Justifications for IP

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# Administrative...

- Mid-term exam will be posted later this week
- 40% weighting (final 60%)
- Based on:
  - Lectures
    - Plus Office Hours sessions
  - “Suggested” reading material
  - Slides
  - NOT based on:
    - “Optional” reading material

# Where we left off...

- Nature and types of IP
  - Patent
  - Copyright
  - Trademark
  - Trade secret
  - Other
- Focus on **patent** and **copyright**
- Origins
  - Patent: monopoly privilege
  - Copyright: censorship

# Today's Lecture

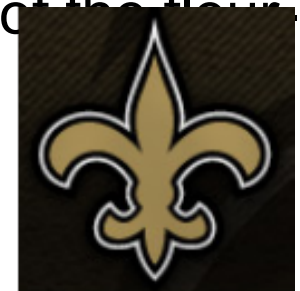
- Modern patent and copyright: utilitarian-based complicated legislative schemes

# Outrages/News of the Week

- From c4sif.org
- Lawmakers renew push for “rogue websites” bill
  - Congressmen vowed to pass legislation giving the U.S. Justice Department new authority to go after foreign and domestic websites that sell pirated music and movies and counterfeit goods.
- Patent defendants aren't copycats. So who's the real inventor here?
  - in computers and software, *less than 3%* of the patent lawsuits studied involved allegations of copying, and less than 1% involved proof of copying
- Google's Defensive Patent Acquisition
  - its “bid for Nortel's patent portfolio in the company's bankruptcy auction” to “create a disincentive for others to sue Google” so that Google will be allowed to “continue to innovate.”

# Outrages/News of the Week

- [Yankee with New Orleans Origins claims ownership of New Orleans Saints' "Fleur de Lis" Symbol](#)
  - Vermont descendant of the New Orleans founding families of d' Iberville and de Bienville filed a lawsuit against the New Orleans Saints and NFL in New York for the misappropriation of the fleur de-lis.
- [Everything is a Remix](#)
  - Superb videos illustrating remixing in art
- [RIM strikes licensing deal with Intellectual Ventures for 30,000 IP assets](#)
  - IV made \$700 million in licensing revenue in 2010; total revenue to date is around \$2 billion
- [Men At Work lose song plagiarism appeal](#)
  - the copyright owners for Kookaburra Sits in the Old Gum Tree claim millions of dollars in unpaid royalties from Down Under



# Outrages/News of the Week

- FDA and USPTO: Joint Killers

- people suffering from the genetic illness Fabry disease are unable to obtain the drug Fabrazyme, which is in short supply because the sole, monopolistic manufacturer, Genzyme, can't make enough quickly enough—and no one else is permitted to make it due to the patent.
- the NIH denied the petitioners march-in request stating that they did not believe that allowing other manufacturers to make the patented product would remedy the shortage *because administrative laws of its sister agency (the FDA) make it impossible to timely manufacture the drug.*

# Law Continued: Patent Trolls

- See: [Facebook Threatened by a Non-Patent Troll and Patent Trolls and Empirical Thinking](#)
  - Mises blog, Sep. 25, 2009 & June 22, 2006
  - What are “trolls”?
    - Patentees who do not make what they sue on
    - No requirement
    - See Kinsella, "[Reducing the Cost of IP Law](#)" *Mises Daily* (January 20, 2010)
      - Under current law, there is no requirement that an invention be actually reduced to practice before a patent is granted on it, or that it be "worked" after grant to maintain the patent in force.
      - When a patent application is filed, this is considered to be a "**constructive reduction to practice.**"
      - It would make it more difficult to obtain frivolous patents if the inventor had to make an actual, working model of the invention — and if the patented invention had to be actually worked or used by the patentee to stay in force.
    - Trolls hard to stop otherwise
    - Misplaced criticism



# Law Continued: Photography

- See [Photography and the law](#) (Wikipedia)
- The owner of the copyright in the photograph is the photographer--the person who creates it
  - Watermarks
  - Amateur issues (printing etc.)
  - Copyright-protected works in the scene
    - Music
    - Sculptures
    - Home videos—children dancing

# Law Continued: Key IP Statutes and Treaties

- Historically

- 1624: Statute of Monopolies 1623 (England): key patent statute
- 1710: Statute of Anne 1709 (England): key copyright statute
- 1691: South Carolina enacts first "general" patent law
  - as distinguished from authorization to the Crown to make patent grants

# Law Continued: Key IP Statutes and Treaties

## ● Modern IP (US)

- Patent: [Constitution](#); [Patent Act of 1790](#); [Patent Act of 1952](#); now [Title 35, USC](#)
  - [USPTO](#) (Dept. of Commerce)
- Copyright: [Constitution](#); [Copyright Act of 1790](#); now [Title 17, USC](#)
  - [Copyright Office](#) (Library of Congress)
- Trademark: state law, plus federal
  - [Lanham Act](#) of 1946: Title 15, Ch. 22 of USC
  - USPTO
- Trade Secret: mostly state law
  - [Restatement \(Second\) of Torts §757](#) and [Uniform Trade Secrets Act \(UTSA\)](#) (1979)

# Law: Key IP Statutes and Treaties (cont.)

- Modern IP Additions (US)

- Copyright

- [No Electronic Theft Act](#) (NET Act) (1997)

- criminal prosecution for copyright infringement
      - Up to five years in prison and up to \$250,000 in fines.

- [Sonny Bono Copyright Term Extension Act](#) (CTEA) (1998)

- Sonny Bono Act, or “Mickey Mouse Protection Act”
      - Extended copyright term by 20 years (life of author plus 70 years, or 95/120)

- [Digital Millennium Copyright Act](#) (DMCA) (1998)

- criminalizes use of DRM anti-circumvention technology
      - Key “safe harbor” for OSPs and ISPs for copyright liability
        - [Online Copyright Infringement Liability Limitation Act](#) (“OCILLA”)
      - DMCA added “Vessel Hull Design Protection Act”--protection for boat hull designs

# Law: Key IP Statutes and Treaties (cont.)

- Modern IP Additions (US)

- Trademark: Antidilution

- [Federal Trademark Dilution Act of 1995](#)

- Trademark Dilution Revision Act of 2006

- Trade Secret

- Federal [Economic Espionage Act of 1996](#) ([18 U.S.C. § 1831–1839](#))

- makes the theft or misappropriation of a trade secret a federal crime

- Major International Bodies

- [World Trade Organization](#) (WTO)

- Organization for liberalizing international trade

- [World Intellectual Property Organisation](#) (WIPO)

- UN agency for IP protection

# Law: Key IP Statutes and Treaties (cont.)

## ● IP Treaties

- [Paris Convention for the Protection of Industrial Property](#) (1883)
  - Permits patent filing date in first country to be relied on in others
- [Patent Cooperation Treaty](#) (PCT) (1970)
  - Unified procedure to file international or “PCT” applications can be filed
  - Still examined separately and result in national or regional patents
    - Regional: [European Patent Convention](#) (EPC) of 1973
      - European patents granted by [European Patent Office](#) not unitary
      - Side by side with national patents
- [Berne Convention for the Protection of Literary and Artistic Works](#) (1886) and [WIPO Copyright Treaty](#) of 1996
  - International standard for and recognition of copyright of other countries

# Law: Key IP Statutes and Treaties (cont.)

- IP Treaties

- Madrid System

- international registration of **trademarks**
    - administered by the International Bureau of WIPO

- General Agreement on Tariffs and Trade (GATT)

- 1994 Uruguay Round covers IP

- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the WTO that sets down minimum standards for many forms of intellectual property regulation as applied to nationals of other WTO Members

# Law: Key IP Statutes and Treaties (cont.)

- Pending IP Laws and Treaties

- [Anti-Counterfeiting Trade Agreement](#) (ACTA)

- See <http://c4sif.org/tag/acta/>

- Proposed agreement for the purpose of establishing international standards on intellectual property rights enforcement

- would create its own governing body outside existing international institutions such as the WTO and WIPO

- Designed to protect copyright **and** patent (and trademark?)

- Copyright: Anti-circumvention prohibition as with DMCA

- [Combating Online Infringement and Counterfeits Act](#) (COICA)

- See <http://c4sif.org/tag/coica/>

- Proposed in United States Senate

- allows the blocking the domain names of web sites accused of piracy

- Agitation to add IP laws for [fashion](#), [database rights](#), etc.



# Patent as Monopoly

- From last class:

- At time of Statute of Monopolies, patents were not yet called “intellectual property”
- later propaganda ploy
- *“Those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, 'property', for a word that had an unpleasant ring, 'privilege'.”*
  - --F. Machlup and E. Penrose: "The Patent Controversy in the Nineteenth Century." *J. Econ. Hist.* 10 (1950), p.1, 16

# Patent as Monopoly (cont.)

- *“While some economists before 1873 were anxious to deny that patents conferred “monopolies”--and, indeed, had talked of “property in inventions” chiefly in order to avoid using the unpopular word “monopoly”--most of this squeamishness has disappeared. But most writers want to make it understood that these are not “odious” monopolies but rather “social monopolies”, “general welfare monopolies”, or “socially earned” monopolies. Most writers also point out with great emphasis that the **monopoly grant is limited and conditional.**”*
  - --F. Machlup, 1958

# Upcoming Topics...

- Overview of arguments for IP
  - Rights based (deontological, creation-based, natural law, principled)
  - Wealth-maximization (utilitarian, consequentialist)
- Property, Scarcity, and Ideas
  - the nature of property rights, role of scarcity, and the function of the market
- Market vs. scarcity
- Perversity of artificial scarcity of information and knowledge
- Diluting effect of new rights
  - Negative and positive rights
  - Inflation analogy
  - IP rights as positive right
    - Redistribution of rights
    - Recall origin in monopoly privilege and censorship
- The basis of libertarian rights and norms