

# Regulating Knowledge: Intellectual Property and the 21st Century University

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Michael Madison

Professor of Law, University of Pittsburgh School of Law

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## Background assumptions about the university

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- **COMMONS:** The university is a form of “knowledge commons,” an institution (set of rules) for sharing knowledge.
- **CUSTOMS and PRACTICES:** Universities produce, store, and share knowledge via overlapping and “nested” systems of informal and formal customs, traditions, norms, and expectations that span space and place.
- **FACULTY RIGHTS:** Universities are characterized by strong traditions of shared governance and academic freedom.
- **FACULTY DUTIES:** Faculty are expected to engage substantially in research and scholarship, teaching, and service to the public (both the university community and the community beyond the university).
- **UNIQUE UNIVERSITY INSTITUTIONS:** Universities are creatures not entirely of the marketplace nor of the state, but in multiple ways universities are independent of both and dependent on both.
- **MISSION and REVENUE:** The university has dual (and overlapping) aims.

# Overview of intellectual property law and policy

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- **3 BRANCHES:** Conventional IP has 3 main branches: patent law, copyright law, and trademark law.
- **PUBLIC POLICY:** Purposes of IP laws are to promote the production and distribution of new knowledge (creative works, innovative technologies) via creating marketable knowledge goods (inventions, copyrighted works), protecting free expression / free use/ the public domain, and regulating fair competition practices (via accurate use of trademarks), all by encouraging the creation and protection of competitive markets in knowledge-related goods, services, and symbols.
- **GEOGRAPHY:** IP systems are national systems. International IP treaties exist, but domestic IP law (e.g., US copyright law) applies to domestic IP production and use.
- **STATUTORY:** IP law is statutory and mostly a matter of federal law, not state law. IP practice depends heavily on contracts, and contract law is mostly a matter of state law (e.g., New York or California, etc.).
- **ADDITIONAL LAWS:** IP is also regulated via other federal law (e.g., FDA rules, IRS rules, export controls), state and federal employment law, and institutional policy (e.g., employee handbooks).

## Patent law basics

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- **INVENTIONS:** Patent law covers novel, nonobvious, and useful processes, machines, manufactures, and “compositions of matter,” or, in general, applications of science, technology, and engineering. The Supreme Court: “anything under the sun that is made by man” should be patentable.
- **PATENTING is a PROCESS:** Patents are issued by the US Patent Office (and other patent offices) after lengthy and expensive prosecution of patent applications. Provisional patents (without claims) can establish an early filing date if a full application is filed within 12 months.
- **INVENTORS and ASSIGNMENTS:** Patent rights belong to the actual human inventors but can be assigned to employers or others (and almost always are). Patents last for 20 years from the date of filing. Patents are often licensed by their inventors to others to develop commercial products and companies.
- **BEWARE DISCLOSURE:** Public disclosure or public use of the invention effectively destroys the right to patent.
- **SHORT BUT POWERFUL RIGHTS:** Virtually any commercial use of a patented technology requires a license. There is no “fair use” of patented inventions. Buying a device includes an implied license to use embedded inventions.

# Copyright law basics

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- **ORIGINAL, EXPRESSIVE WORKS:** Copyright law covers “original” works of authorship, i.e., creative “expression” in traditional fields of arts and culture (literature, music, visual arts) and modern fields (computer programming, graphic design, architecture). “Original” means “minimally creative.”
- **FIXED in a TANGIBLE MEDIUM:** Copyrights arise automatically whenever an original “work” is “fixed” in some tangible medium (printed book, canvas, computer storage medium).
- **EFFECTIVELY ENDLESS:** Copyrights last effectively forever (life of the author plus 70 years, for individual authors). Copyrights belong to their authors but may be transferred to others. Works by employees usually belong to their employers as “works made for hire.” A judicial “teacher exception” exists for academic works.
- **IDEAS and FAIR USE:** Use of copyrighted works is subject to numerous exceptions and limitations, including the line between ideas and expression, the concept of fair use, and the principle of first sale.
- **THE PUBLIC DOMAIN:** Copyright today applies equally to unpublished and published works. Much older works – those published prior to 1923 – are in the public domain.

# Trademark law basics

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- **SIGNS and SYMBOLS:** Trademark law applies to signs and symbols that merchants use to distinguish their goods and services in the marketplace. Almost any non-functional, non-generic symbol may be covered if it is “distinctive” with respect to a product, service, or firm, including slogans, product designs, colors, & smells.
- **REGISTRATION OPTIONAL:** Registration of the trademark in the US Trademark Office is permitted but is not required in order to secure trademark rights.
- **USE-BASED RIGHTS:** Copyright law awards ownership based on originality. Patent law awards ownership based on invention. Trademark law awards ownership based on use.
- **NO EXPIRATION:** Trademark rights last as long as the owner continues to use the mark.
- **CONFUSION as the TOUCHSTONE:** TM law primarily protects the owner from unauthorized uses of the mark that are likely to cause consumer confusion. The core of TM law is tort law (unfair competition), though increasingly, property-like rights against any unauthorized use are recognized (protection of the TM owner’s “goodwill”).
- **FAIR COMPETITION and FREE SPEECH CONCERNS:** TM enforcement is subject to many additional exceptions and limitations, including species of fair use and fundamental rights of free expression.

## Problems at the university/IP intersection

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- **UNIVERSITIES** promote the production and distribution of new knowledge via non-IP mechanisms, and they serve public goals.
- **UNIVERSITIES** usually exist within global research and scholarly communities.
- **UNIVERSITIES** depend on webs of custom and tradition.
- **IP LAW** regulates differently: It rewards the production of knowledge via private rights over creation and invention but also enables rent-seeking and imposes barriers to using and re-using knowledge.
- Effective **IP LAW** systems usually depend on clarity of rights ownership and allocation and on effective modes of contracting.
- **IP LAW** systems are (along with other forces) pulling universities into becoming more like market actors, despite the (natural, and often productive) inefficiencies of universities.

## Problems at the university/IP intersection

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- **UNIVERSITIES ARE BECOMING MORE LIKE “ORDINARY” CREATURES OF THE MARKET:** This is so despite the (natural, and often productive) inefficiencies of universities.
- **UNIVERSITIES and FACULTY MEMBERS HAVE OVERLAPPING BUT DIFFERENT INTERESTS in IP ISSUES**
- **RESOURCE CONSTRAINTS:** Universities (and faculty members) often need market-derived revenue wherever they can find it.
- **THE LOGIC OF IP LAW ITSELF:** Expansion of the role and scope of IP law systems – both as “asset exploitation” and as “risk avoidance” – generally dictates their expansion into domains previously excluded from market regulation.



## Patent law challenges and trends: Follow the money.

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- **BAYH-DOLE and OWNERSHIP:** Pre-invention assignments and university policies regarding ownership of federally-funded inventions; the selection of research questions.
- **UNIVERSITY as PROPRIETOR:** The technology transfer / commercialization / enforcement imperative; conflicts of interest, disclosure and university policy, litigation problems; and issues with faculty roles, stakes, and compensation.
- **CORPORATE SPONSORSHIP:** Who owns research results and revenues when corporations and foundations sponsor or support research? When researchers collaborate across industry and university lines?
- **ACCESS:** Can funders and sources place conditions on access to materials (MTAs) or other resources (e.g., equipment, protocols)? Note issues with ownership of improvements (e.g., leading to blocking patents) v. ownership of new inventions.
- **DISCLOSURE:** Patent law rules in conflict with publishing and presenting interests of faculty and students. How should universities balance access interests and editorial control/secretcy interests?

## Copyright law challenges and trends: Markets intrude.

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- **PUBLISHING:** What is the future of journals?
- **ACCESS:** What is the future of assignment and open access terms in author agreements, open access policies, and the role of university presses and the university library.
- **OWNERSHIP:** Who owns research and scholarship?
- **OWNERSHIP:** Data, datasets, and data-intensive science (Big Data).
- **OWNERSHIP:** Syllabi.
- **SHIFTING LANDSCAPES:** Online education, MOOCs and such.
- **CLEARING RIGHTS:** Classroom teaching, course reserves, fair use, and the Copyright Clearance Center (CCC).

# Trademark law challenges and trends: The camel's nose.

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- **BRANDING:** The image of the university.
- **WHO ELSE?:** Faculty and students as brands.
- **WHO KNEW?:** Big-time athletics, but also beyond: academic programs, health care, and research output.
- **SUBJECT MATTER:** Names, mascots, nicknames, slogans, logos, and colors.
- **DIRECTED TO:** Affinity merchandise, off-campus merchandise, broadcasting, Internet applications / social media, faculty inventions.
- **HOW:** TM management programs (the Collegiate Licensing Company (CLC)) and litigation.
- **PROBLEMS:** Historical uses; parody and other free expression / speech concerns.

## The future?

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- What is the future of the university's historic commitments to academic freedom, shared governance, the dissemination of knowledge, and public service?
- How does the university manage conflicts of interest between the university (market / revenue goals?) and faculty or students (academic freedom – but also revenue goals)?
- What rights does the university claim vis a vis faculty and students?
- How are those rights documented and implemented?
- From “a company of scholars” to ... “a company”?

# Thank you.

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➤ Responses.

➤ Questions?

➤ Find me:    michael.j.madison@gmail.com  
                  @profmadison  
                  <http://madisonian.net/home>