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Hard Truths About Soft IP

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HARD TRUTHS ABOUT "SOFT IP"

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People routinely refer to copyright and trademark as "soft IP" to distinguish these practices from another area of intellectual property: patent. But the term reflects implicit biases against copyright and trademark doctrine and practitioners. "Soft IP" implies that patent law alone is hard, even though patents are no more physically, metaphorically, or intellectually hard than copyrights and trademarks. Despite stereotypes to the contrary, patents are not necessarily more practically hard: While the U.S. Patent and Trademark Office requires technical training for select patent prosecutors, which excludes many women and people of color, no such experience is necessary for most patent litigators or advisers.

So what's so soft about "soft IP"? Simple: Women are more likely to be practitioners, partners, and professors within copyright and trademark law, and softness has been associated with women for centuries. Softness is resilient, flexible, and supportive, but "soft IP" is rarely invoked to celebrate these connotations. Instead, the term implies, intentionally or not, that people who practice copyright and trademark law are less capable of hard work than patent practitioners. Given the oppression faced by women and people of color in legal practice, little could be further from the truth. This Piece traces problems with presenting patents as hard, as well as the shortcomings of sidelining copyrights and trademarks as soft. It concludes that the term "soft IP" must be retired and replaced. Sometimes, the right decision is specificity. But there is another alternative. Lawyers can opt for a more sweeping term.

I regularly receive emails from students asking about my "soft Intellectual Property (IP)" work. They want to know what it's like to handle copyright and trademark matters that promote social justice. Students in the Georgetown Intellectual Property and Information Policy Clinic, which I founded in 2019, have advised clients, in part, on using copyright

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and trademark law to promote accessible and equitable library practices,[1] permit repair and modification of personal devices,[2] and appropriate art to critique power.[3] My scholarship uses copyright and trademark law to shape better technologies, from challenging nonconsensual intimate imagery[4] and countering invasive face surveillance[5] to uncovering secret surveillance technologies.[6] Both areas of law create space for creative, complex practices that students are eager to pursue.

By flagging an interest in "soft IP," these students use a shorthand that distinguishes their interests in copyright and trademark from another form of intellectual property: patent.[7] But, unbeknownst to them, doing

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1. See Libr. Futures, Controlled Digital Lending: Unlocking the Library's Full Potential 1 (2022), https://www.libraryfutures.net/policy-document-2021 [https://perma.cc/4AWV-94YK] (arguing for "controlled digital lending" in libraries to expand access to library resources).

2. See Elec. Frontier Found., Comments of the Electronic Frontier Foundation on Proposed Class 12: Computer Programs—Repair 2 (2020), https://www.eff.org/document/dmca-1201-2021-comments-electronic-frontier-foundation-proposed-class-12-computer-programs [https://perma.cc/2342-XEKU] (supporting the proposed exemption from the circumvention ban of electronic devices to permit "rights to repair, diagnose, and modify devices in noninfringing ways").

3. See, e.g., Genuine Unauthorized Clothing Clone Institute, https://genuineunauthorized.com/ [https://perma.cc/T6Y3-M7N7] (last visited Feb. 15, 2024) (parodying Marc Jacobs and Gucci luxury brand garments); see also Lux Alptraum, What Is Luxury Without the Logos?, N.Y. Times (May 24, 2022), https://www.nytimes.com/2022/05/24/style/abigail-glaum-lathbury-clothing-logos.html (on file with the *Columbia Law Review*) (last updated June 8, 2022) (describing the Genuine Unauthorized project and other "luxury agitators" who seek to challenge "prevailing ideas about originality, brand value and desire"). The Clinic is not limited to copyright and trademark matters, however. Other matters have engaged patent, privacy, and cybersecurity law, as well as legal ethics. See Intellectual Property and Information Policy Clinic, Our Work, Geo. L., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/intellectual-property-and-information-policy-clinic/our-work/ [https://perma.cc/5GQ6-6M8Y] (last visited Feb. 15, 2024).

4. E.g., Amanda Levendowski, Note, Using Copyright to Combat Revenge Porn, 3 N.Y.U. J. Intell. Prop. & Ent. L. 422 (2014).

5. E.g., Amanda Levendowski, Resisting Face Surveillance With Copyright Law, 100 N.C. L. Rev. 1015 (2022).

6. E.g., Amanda Levendowski, Dystopian Trademark Revelations, 55 Conn. L. Rev. 681 (2023); Amanda Levendowski, Trademarks as Surveillance Transparency, 36 Berkeley Tech. L.J. 439 (2021).

7. As Eric Goldman pointed out in his piece critiquing the term "soft IP," the term "intellectual property" is itself fraught. See Eric Goldman, Let's Stop Using the Term "Soft IP", Tech. & Mktg. L. Blog (Jan. 8, 2013), https://blog.ericgoldman.org/archives/2013/01/a_phrase_to_ret.htm [https://perma.cc/48SL-5WDL] (acknowledging but sidestepping the broader debate around the term "intellectual property").

Whether the term "intellectual property" is advisable remains a matter of debate. The term emerged during debates about abolishing the patent system in the 1870s, and it rose to prominence in the 1980s. See Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates 275–78 (2009) (chronicling a countermovement to the patent abolition movement which sought to strengthen the patent system and which became one

so reflects an implicit bias against copyright and trademark practice and practitioners. If those practices are soft, it follows that patents are hard. "Hard" can mean physically solid. It can also mean mentally taxing. So what's so hard about patents?

"Hard" can't mean that patents protect only tangible inventions because they also protect intangible processes.[8] "Hard" can't mean that patents only cover inventions connected to the "hard" sciences—like biology, chemistry, and engineering—because two types of patents protect even designs with no connection to those fields: utility and design patents.[9]

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of the "first forums in which a reader could . . . encounter . . . a universal and uniform kind of property" known as intellectual property). Today, the term is pervasive, but it's not without problems. First, the term lacks clarity. IP generally includes copyright, trademark, and patent, but some practitioners and professors use the term to include other areas of law, such as trade secrets and right of publicity, which can create confusion about how the doctrines interoperate. See infra note 29 and accompanying text; see also Intellectual Property: The Term, Elec. Frontier Found., https://www.eff.org/issues/intellectual-property/the-term [https://perma.cc/XR3M-5KT9] (last visited Feb. 18, 2024) ("Sure, 'intellectual property' includes copyright, patent, and trademark law, but . . . some may [also] use the term to refer to one or more of trade secrets, rights of publicity, semiconductor masks, or industrial designs, among other things. This ambiguity can create confusion . . . ."). Second, cloaking these doctrines in the language of "property" is a misnomer, if not flat-out misleading. Scholars, including Professors Rochelle Dreyfuss and Pamela Samuelson, have long expressed skepticism over rebranding these disparate information law regimes as property given their important differences. See, e.g., Rochelle Cooper Dreyfuss, We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity, 20 Colum.–VLA J.L. & Arts 123, 156 (1996) (warning of a tension between the growth of laws of unfair competition and rights of publicity and "intellectual property principles"); Pamela Samuelson, Information as Property: Do *Ruckelshaus* and *Carpenter* Signal a Changing Direction in Intellectual Property Law?, 38 Cath. U. L. Rev. 365, 395–99 (1989) (describing examples of "changing attitudes in the law regarding the benefits of free dissemination of information," and highlighting the competing principles of unfair competition and property in "intellectual property law"); see also Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Tex. L. Rev. 1031, 1036 (2005) (observing that "[o]ld rhetoric" equating intellectual property to monopoly has been replaced by a "recognition that a right to exclude in intellectual property is no different in principle from the right to exclude in physical property" (quoting Frank H. Easterbrook, Intellectual Property Is Still Property, 13 Harv. J.L. & Pub. Pol'y 108, 112 (1990))); Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 314–21 (1996) (linking IP to Chicago School philosophies). Settling this debate extends beyond this Piece, but its use of IP recognizes that undercurrents of dissatisfaction are roiling beneath the term.

8. See 35 U.S.C. § 101 (2018) ("[A]ny new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . . .").

9. Eric Goldman raises this point in his criticism of the term "soft IP." See Goldman, supra note 7 ("[T]he term 'soft IP' . . . might imply a[] linkage with 'hard sciences' that isn't necessarily true."). Further, the term "hard sciences" is not neutral. While the division between some so-called hard and soft sciences predates the inclusion of women in the field, the same sexist implications that underpin "soft IP," discussed below, apply to relatively recent distinctions between the hard and soft sciences: More women in a field somehow makes it soft. See Alysson E. Light, Tessa M. Benson-Greenwald & Amanda B. Diekman, Gender Representation Cues Labels of Hard and Soft Sciences, 98 J. Experimental Soc.

Utility patents may protect inventions detached from the hard sciences, such as a pool filled with sprinkles.[10] Similarly, design patents can protect aesthetic features disconnected from hard sciences, like the curves of an iPhone.[11] "Hard" can, however, mean "hard for marginalized people to break into."[12]

No specialized training is required for most patent litigation or counseling, but the U.S. Patent and Trademark Office (USPTO) only permits people with select technical educational backgrounds to qualify for the Patent Bar.[13] Admission to the Patent Bar is required for drafting and acquiring patents, a practice called "patent prosecution," as well as litigating as lead counsel before the Patent Trial and Appeal Board.[14] There is no comparable barrier to copyright and trademark practice. Because of these requirements, however, many students mistakenly believe a technical background is necessary for all patent, or even all IP, work. Many IP clinics' work, including Georgetown's, challenge that misconception—yet it persists.[15]

Psych. 104234, at 10, 23 (2022) (finding a robust association between the designation of "soft science" and the representation of women within a field).

10. See, e.g., System, Method, and Apparatus for Simulating Immersion in a Confection, U.S. Patent No. 10,513,862, at [57] (filed Nov. 17, 2017).

11. See, e.g., Apple v. Samsung Elecs., No. 5:11-cv-01846 (N.D. Cal. June 30, 2012) (enforcing design patent for aesthetics of iPhone). For a deeper discussion of design patents, see generally Sarah Burstein, The Patented Design, 83 Tenn. L. Rev. 161 (2015).

12. Which is not to say that copyright or trademark law is easy for marginalized people—the opposite is often true. See, e.g., Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (striking down a bar on disparaging trademarks); Request for Reconsideration, DYKES ON BIKES, No. 78281746 (Apr. 26, 2005) (appeal from USPTO Examiner denial of trademark application for DYKES ON BIKES mark as disparaging); K.J. Greene, "Copynorms," Black Cultural Production, and the Debate Over African-American Reparations, 25 Cardozo Arts & Ent. L.J. 1179, 1194–202 (2008) (documenting racial subordination by IP law and white appropriation of marginalized cultural production); Sonia K. Katyal, Brands Behaving Badly, 109 Trademark Rep. 819, 828–31 (2019) (recounting sexist and racist trademarks registered post-*Tam*); Amanda Levendowski, Feminist Use, *in* Feminist Cyberlaw 11, 14 (Meg Leta Jones & Amanda Levendowski eds., 2024) (detailing exclusionary origins of copyright law and sexist, racist, and colonialist fair uses); Rebecca Tushnet, My Fair Ladies: Sex, Gender, and Fair Use in Copyright, 15 Am. U. J. Gender, Soc. Pol'y & L. 273, 275 (2007) (discussing privileging sexualized critique as fair use); Anjali Vats, The Racial Politics of Fair Use Fetishism, 1 LSU J. Soc. Just. & Pol'y 67, 79–82 (deconstructing how fair use is grounded in whiteness).

13. General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office, USPTO (2024), https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf [https://perma.cc/3V85-9F73]. Those requirements do not, however, include earning a J.D. See 37 C.F.R. § 11.6(b)–7 (2024) (stating that nonattorney individuals with qualifying technical backgrounds may be eligible to become "patent agents" after sitting the Patent Bar). This is not meant to imply that becoming a patent agent is easy, only that it is not necessarily harder than becoming a copyright or trademark practitioner.

14. See USPTO, supra note 13.

15. See Cynthia L. Dahl & Victoria F. Phillips, Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics, 25 Clinical L. Rev. 95, 100–01 (2018)

Scholars have critiqued the USPTO's gatekeeping and its effects on equity, and the USPTO is responding.[16] While the USPTO revisits its Patent Bar requirements, those rules continue driving perception and practice in ways that have measurable, exclusionary effects on women.[17] According to recent empirical work by patent attorneys Elaine Spector and LaTia Brand, women registrants with the Patent Bar were virtually nonexistent until the early 1980s.[18] Today, women comprise more than half of incoming law school classes yet only a disproportionately small fraction of registered patent attorneys.[19] For women of color, the statistics are even starker:

(documenting a variety of IP matters undertaken by more than seventy IP and technology clinics, the vast majority of which require no technical background).

16. See Saurabh Vishnubhakat, Gender Diversity in the Patent Bar, 14 J. Marshall Rev. Intell. Prop. L. 67, 68 (2014) ("Much current research on the participation of women in the intellectual property system has been doctrinal, focusing on the intersections of feminist theory . . . with intellectual property law more generally. While this literature advances a conceptual framework . . . , empirical work in this area has been sparse."); see also Christopher Buccafusco & Jeanne C. Curtis, The Design Patent Bar: An Occupational Licensing Failure, 37 Cardozo Arts & Ent. L.J. 263, 266 (2019) ("[T]he PTO's eligibility rules have a disparate impact on the number of women who can prosecute design patents. The patent bar is heavily skewed towards men."); Mary T. Hannon, The Patent Bar Gender Gap: Expanding the Eligibility Requirements to Foster Inclusion and Innovation in the U.S. Patent System, 10 IP Theory 1, 2 (2020) (describing the exclusion of qualified women from the patent bar as "a result of the perpetuation of an institutionally biased and outdated set of scientific and technical requirements" and the USPTO's failure to recognize this lack of gender diversity).

17. The USPTO has sought comments about revisiting these technical requirements and creating a new design patent practitioners bar, which might have no such requirements. See Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office, 87 Fed. Reg. 63044 (request for comments Oct. 18, 2022). Scholarly calls to reimagine the patent bar are not new. See William Hubbard, Razing the Patent Bar, 59 Ariz. L. Rev. 383, 384–91 (2017) (discussing the murky origins of the technical prerequisite and proposing its abandonment); Alexander S. Evelson, Cassidy A. Pomeroy-Carter, Phil Malone, Stanford Law School's Juelsgaard Intell. Prop. & Innovation Clinic, In the Matter of Request for Comments on Administrative Updates to the General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office at 1–2 (May 24, 2021) (encouraging USPTO to amend eligibility requirements to include common degrees in relevant topics currently excluded from qualification). While multiple comments were supportive of shifts for registered patent attorneys, several reveal patent practitioners' disdain for IP practices and practitioners without technical backgrounds. See Expanding Admission Criteria for Registration to Practice in Patent Cases: Browse Posted Comments, Regulations.gov, https://www.regulations.gov/document/PTO-P-2022-0027-0001/comment [https://perma.cc/2TTX-R6MU] (last visited Mar. 6, 2024). Thanks to Sarah Burstein for flagging many attorneys' responses.

18. See Elaine Spector & LaTia Brand, Diversity in Patent Law: A Data Analysis of Diversity in the Patent Practice by Technology Background and Region, 13 Landslide 32, 34–35 & fig.5 (2020) ("Although USPTO registration data is available as early as 1950, female registrations were virtually nonexistent until the early 1980s, with the first significant jump in registrations among women occurring in 1989 and gradually increasing until 2013.").

19. See id. ("In 2017, the highest percentage of women were registered with the USPTO than any other year. In that year, 33.9 percent of all registrations were female. Given

There are more patent attorneys and agents named "Michael" than racially diverse women, who compose only 1.7% of registered patent attorneys and agents.[20] But no matter how hard it is for women to join the

that women account for more than 50 percent of law school entering classes, there is still a long way to go . . . .").

20. Id. Gender disparities within patent law also extend to acquisition. See Jordana R. Goodman, Ms. Attribution: How Authorship Credit Contributes to the Gender Gap, 25 Yale J.L. & Tech. 309, 322 (2023) (discussing gender disparities in client acquisition); Jordana R. Goodman, Sy-STEM-ic Bias: An Exploration of Gender and Race Representation on University Patents, 87 Brook. L. Rev. 853, 853 (2022) (examining the historical exclusion of women and people of color from STEM fields); Amy C. Madl & Lisa Larrimore Ouellette, Policy Experiments to Address Gender Inequality Among Innovators, 57 Hous. L. Rev. 813, 814 (2020) (describing the social problem of inequality among innovators); W. Michael Schuster, R. Evan Davis, Kourtenay Schley & Julie Ravenscraft, An Empirical Study of Patent Grant Rates as a Function of Race and Gender, 57 Am. Bus. L.J. 281, 282 (2020) (finding that women and people of color receive patent approvals at lower rates); W. Michael Schuster, Miriam Marcowitz-Bitton & Deborah R. Gerhardt, The Gender Gap in Academic Patenting, 56 U.C. Davis L. Rev. 759, 762 (2022) (examining gender disparities in academia); Nina Srejovic, Patents and Gendered Views of Programming as Drudgery or Innovation, *in* Feminist Cyberlaw, supra note 12, at 38, 153 (on file with the *Columbia Law Review*). In 2019, only 12.8% of American inventors were women, while just 21.9% of patents identified at least one woman inventor. Press Release, USPTO, USPTO Releases Updated Study on Participation of Women in the U.S Innovation Economy (July 21, 2020), https://www.uspto.gov/about-us/news-updates/uspto-releases-updated-study-participation-women-us-innovation-economy-0 [https://perma.cc/4U4R-HXW8]. For comparison, as of 2020, 38.5% of all authors with copyright registrations were women, and at least 41.9% of all works included at least one woman author—far from parity but preferable to patents' performance. U.S. Copyright Off., Women in the Copyright System: An Analysis of Women Authors in Copyright Registrations From 1978–2020, at 6 (2020), https://www.copyright.gov/policy/women-in-copyright-system/Women-in-the-Copyright-System.pdf [https://perma.cc/HSP5-BEHE]. For data on race, age, and gender in copyright registrations, see generally Robert Brauneis & Dotan Oliar, Copyright's Race, Gender and Age: A First Quantitative Look at Registrations (Geo. Wash. Univ. L. Sch. Pub. L. Research Paper No. 2016-48, 2016), https://ssrn.com/abstract=2831850 [https://perma.cc/3XRC-SE36]. Excluding women inventors from patents may be a feature, not a bug. Patents reward a form of knowledge production that has been historically coded as white and male, with expected effects on women, people of color, and most especially women of color. See Kara W. Swanson, Centering Black Women Inventors: Passing and the Patent Archive, 25 Stan. Tech. L. Rev. 305, 373 (2022) (arguing that the "patent system . . . was experienced differently depending on the race and gender of its participants"); see also Debora Halbert, Feminist Interpretations of Intellectual Property, 14 Am. U. J. Gender Soc. Pol'y & L. 431, 437–38 (2006) (exploring when and how IP can be coded as masculine by developing a feminist epistemology). In 2014, the USPTO experimented with a pilot program to support pro se inventors (inventors without legal representation) seeking patents, which had a positive impact on closing the patent acquisition gender gap: The program increased women's probability of obtaining a patent by 11%. Nicholas A. Pairolero, Andrew A. Toole, Peter-Anthony Pappas, Charles A.W. deGrazia & Mike H.M. Teodorescu, Closing the Gender Gap in Patenting: Evidence From a Randomized Control Trial at the USPTO 2–3 (U.S. Pat. & Trademark Off., Econ. Working Paper No. 2022-1, 2022). For additional work on policy pilots, see generally Colleen V. Chien, Rigorous Policy Pilots: Experimentation in the Administration of the Law, 104 Iowa L. Rev. 2313, 2319–20 (2019) (exploring the viability of "rigorous policy pilots" and arguing that the USPTO should implement them to "support patent law- and policy-making"). These programs do not, however, close the gender gap for patent prosecution.

Patent Bar, "hard IP" is rarely, if ever, invoked to address the exclusionary aspects of patent law.

It's not obvious how classifying patents as "hard IP" clarifies the field. So why draw the distinction? Perhaps the better question is: What's so soft about "soft IP"?

The answer is not the application of copyright and trademark to intangibles, as copyright cannot cover ideas,[21] and both copyrighted works and trademarked goods are routinely embodied in physical forms.[22] Nor is the answer because copyright and trademark are doctrinally easier. When can an artist use another artist's work?[23] When does a commercial product amount to a constitutionally protected parody?[24] Both questions were compelling, challenging, and considered before the Supreme Court last term.

Alternate approaches to grouping IP reveal that connecting copyrights to trademarks makes less sense than pairing patents with either field. One sensible way to group IP fields is by provenance. Only patent and copyright are rooted in the Constitution's Progress Clause, which empowers Congress 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."[25] Another option is by governance. The USPTO exclusively handles U.S. patent and trademark registrations and appeals.[26] Another choice would be embracing the urban

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21. What Does Copyright Protect?, U.S. Copyright Off., https://www.copyright.gov/help/faq/faq-protect.html [https://perma.cc/T2U4-PJRK] (last visited Feb. 18, 2024) ("Copyright does not protect ideas . . . .").

22. E.g., Octavia E. Butler, Parable of the Sower (Seven Stories Press 2017) (1993) (published copyrighted work embodied as book); Andy Warhol, Brillo Boxes (1964) (artistic appropriation of trademark emblazoned on boxes).

23. See generally Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258 (2023) (exploring the scope of the fair use doctrine in copyright infringement against Andy Warhol Foundation for the artist's screenprint of the late Prince, which was based on the litigating photographer's photograph).

24. See Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 147–48 (2023) (examining the contours of trademark parody, particularly as related to liquor company claims of dilution and tarnishment by dog toys riffing on the brand).

25. U.S. Const. art. 1, § 8, cl. 8. Trademarks are instead derived from the Commerce Clause. See Peter J. Karol, The Constitutional Limitation on Trademark Propertization, U. Pa. J. Const. L. 1065, 1076 (2015) ("Congress's power to regulate trademarks implicates and cuts across all three [Commerce Clause authority] categories . . . ."). The first federal trademark law was not enacted until 1870, decades after the Progress Clause was drafted. See Lorelei D. Ritchie, What Is "Likely to Be Confusing" About Trademark Law: Reconsidering the Disparity Between Registration and Use, 70 Am. U. L. Rev. 1331, 1336 (2021).

26. About Us, USPTO (June 5, 2018), https://www.uspto.gov/about-us [https://perma.cc/9Q9X-HZRQ] (last updated Nov. 7, 2022). Copyright registration and rulemaking is managed by the Copyright Office. See Overview, U.S. Copyright Off., https://www.copyright.gov/about/ [https://perma.cc/M4S4-D7C2] (last visited Mar. 6, 2024). The two agencies do not even sit in the same branch of government: The USPTO is an executive branch agency, whereas the Copyright Office is a legislative agency. Compare

legend that "soft IP" alludes to copyright protection of software.[27] Except all three forms of IP can protect software in different ways.[28] A final explanation for "soft IP" is that the term promotes precision. But the primary unifying characteristic of copyright and trademark is neither provenance, governance, nor coverage—it is that they are not patents. And on that basis, some (but not all) people extend "soft IP" to include right of publicity and trade secrecy.[29]

"Soft IP" offers no conceptual, doctrinal, historical, operational, definitional, or practical clarity. So what, exactly, makes copyright and trademark law so soft?

Copyright and trademark attract high numbers of women practitioners, partners, and professors, particularly when compared with patent law, and fields that do so are routinely dismissed as "soft."[30] In

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Legal Info. Inst., United States Patent and Trademark Office (USPTO), Cornell L. Sch., https://www.law.cornell.edu/wex/united_states_patent_and_trademark_office_(uspto) [https://perma.cc/98F2-AXNX] (last updated July 2020), with A Brief History of Copyright in the United States, U.S. Copyright Off., https://copyright.gov/timeline/ [https://perma.cc/7YCF-28DJ] (last visited Feb. 18, 2024).

27. See 17 U.S.C. § 102 (2018) (evidencing a statute that provides copyright protections that might be termed "soft IP"); Copyright Registration of Computer Programs, U.S. Copyright Off., https://www.copyright.gov/circs/circ61.pdf [https://perma.cc/99SD-PHBX] (last edited Mar. 2021). But see Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1205–08 (2021) (holding that Google's unauthorized use of 11,500 lines of Oracle's code was fair use while sidestepping whether copyright protection extended to a software interface).

28. See, e.g., OFFICE WITH OFFICE 2012 DESIGN, Registration No. 4,456,462 (summarizing the status of a Microsoft Corporation trademark for the Microsoft Office design mark, including its trademark protection over unauthorized use by various forms of "computer software"); U.S. Patent No. 5,838,906A (filed Oct. 17, 1994) (protecting an Eolas Technologies patent for browser plugin software); *Google*, 141 S. Ct. at 1190 (evidencing a judicial decision providing protections over copyright that might be termed "soft IP"); Eolas Techs. Inc. v. Microsoft Corp., 399 F.3d 1325, 1328–32 (Fed. Cir. 2005) (upholding jury verdict against Microsoft for $520,562,280 for infringing Eolas's patent). For a discussion of how copyright and patent law handle software, see generally Pamela Samuelson, Staking the Boundaries of Software Copyrights in the Shadow of Patents, 71 Fla. L. Rev. 243 (2019) ("More clarity to the software copyright caselaw can be attained if courts engage in rigorous filtration of unprotectable nonliteral elements of software."). And for a deeper dive into the gender biases embedded in software patents, see generally Nina Srejovic, Patents and the Gendered View of Computer Programming as Drudgery or Innovation, *in* Feminist Cyberlaw, supra note 12, at 38 (describing the role that gender-based constructions of "value" play in innovation and patent protection).

29. To further complicate matters, the Third Circuit recently held that one's right of publicity is a form of IP, and the court's reasoning would likely include trade secrecy as well. See Hepp v. Facebook, 14 F.4th 204, 213 (3d Cir. 2021) ("Our survey of legal dictionaries reveals 'intellectual property' has a recognized meaning which includes the right of publicity."). Eric Goldman also teased out this issue in his takedown of the term "soft IP." See Goldman, supra note 7 ("Sometimes, people use 'soft IP' to refer to . . . IP other than patents—presumably publicity rights, trade secrets, etc.").

30. See Kara Hagen, An Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property, 15 Santa Clara High Tech. L.J. 139, 143 (1999) ("There seem to be fewer female attorneys in patent

private practice, women report working with more women, both as peer practitioners and as partners, in copyright and trademark groups.[31] In academia, half of the twenty most-cited IP scholars are women.[32] More than half of those women scholars frequently focus on copyright and trademark law.[33] (For comparison, there are zero women in the top twenty most-cited scholars within legal academia generally.[34]) And in leadership roles, women rose to the highest levels of the Copyright Office well before

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prosecution and intellectual property litigation than in trademark law, based on the experiences of those interviewed."). More than two decades later, the trend continues. Among IP boutiques in 2017, Fross Zelnick, which specializes in copyright and trademark work, was the lone firm that boasted better-than-parity female attorney rates among associates (52%) and comparatively high numbers for women partners (37%). Bill Donahue, IP Boutiques Still Among Worst for Female Attorneys, Law360 (Apr. 18, 2016), https://www.sternekessler.com/app/uploads/2022/09/IP_Boutiques_Still_Among_Worst_For_Female_Attorneys_Longsworth.pdf [https://perma.cc/A4EQ-ULTC]; cf. Saumya Kalia, STEM Fields With More Women Are Often Dismissed as 'Soft Science,' Shows Study, The Swaddle (Jan. 25, 2022), https://theswaddle.com/stem-fields-with-more-women-are-often-dismissed-as-soft-science-shows-study/ [https://perma.cc/V7Z5-FSGY] (documenting how sociology and biomedical sciences became "soft" due to rising numbers of women in both fields).

31. Hagen, supra note 30, at 145–48.

32. Brian Leiter, 20 Most-Cited Intellectual Property Faculty in the U.S., 2016–2020 (CORRECTED), Brian Leiter's L. Sch. Reps. (Oct. 11, 2021), https://leiterlawschool.typepad.com/leiter/2021/10/20-most-cited-intellectual-property-scholars-in-the-us-2016-2020.html [https://perma.cc/VRR5-RXWU].

33. See, e.g., Amy Adler & Jeanne C. Fromer, Memes on Memes and the New Creativity, 97 N.Y.U. L. Rev. 453, 457 (2022) (analyzing how Internet memes upend assumptions about creativity, commercialization, and copyright); Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. Davis L. Rev. 1151, 1153–54 (2007) (offering a model of artistic and intellectual creativity that emerges from dynamic interactions of individual, social, and cultural patterns); Jane C. Ginsburg, Deep Dive: *Burrow-Giles Lithographing v. Sarony* (US 1884): Copyright Protection for Photographs, and Concepts of Authorship in an Age of Machines 36 (2020) (reflecting on the relatively modern recognition of photographs as copyrightable works); Jessica Litman, Digital Copyright 17 (2017) (detailing the status of digital copyright law and predicting its future); Pamela Samuelson, Allocating Ownership Rights in Computer-Generated Works, 47 U. Pitt. L. Rev. 1185, 1186–88 (1986) (predicting the present obsession with whether copyrights can and should be granted to computer-generated works); Tushnet, supra note 12, at 274 (discussing how the law favors sexualized critique as fair use over other forms of commentary).

34. Or the top thirty-nine—the only two top-cited women scholars are both feminist scholars: Catharine MacKinnon (ranked forty) and Deborah Rhode (ranked forty-five). Fred R. Shapiro, The Most-Cited Legal Scholars Revisited, 88 U. Chi. L. Rev. 1595, 1602 (2021). Unlike top-cited women IP scholars, neither are women of color. Empirical work suggests that scholarly acknowledgements reflect similar biases against women and people of color. See Jonathan I. Tietz & W. Nicholson Price II, Acknowledgements as a Window Into Legal Academia, 98 Wash. U. L. Rev. 307, 311 (2020) (noting "the gendered disparity in acknowledgments"). For a deeper dive into the homogeneity of legal academia, see generally Meera E. Deo, Looking Forward to Diversity in Legal Academia, 29 Berkeley J. Gender L. & Just. 352, 357 (2014) ("Approximately 62% of law faculty members are men and at least 72% are white." (footnote omitted)). Legal scholars seeking to counter such biases can incorporate feminist cyberlaw citation methods into their work. See Amanda Levendowski, Just Citation, 39 Berkeley J. Gender L. & Just. (forthcoming 2024).

the USPTO. Barbara Ringer was the first woman Register of Copyright, and she was appointed in 1973.[35] The first woman to direct the USPTO—Michelle K. Lee, who has a technical background—was appointed decades after Ringer in 2015.[36]

Women practitioners, professors, and other leaders who share an interest in copyright and trademark law have something else in common: a stereotypical association with softness. Society has projected softness onto women for centuries. Softness can be powerful. It's resilient. It's flexible. It's supportive. But I have never heard "soft IP" invoked to signify the strengths of softness, all of which happen to be indispensable to effective lawyering. Rather, fields and skills associated with women are routinely disregarded for being "soft" in ways that reflect a lack of respect for women and the rigor of their work.[37] "Soft IP" carries on this tradition by not-so-subtly suggesting that people who practice copyright and trademark law are, unlike patent practitioners, less up to a hard challenge. As a result, "soft IP" carries a gendered connotation that cannot be less true: Women have practiced law in the United States since 1869,[38] and they are still paid less, promoted less, and punished more for their parenting decisions and practice skills.[39] Women, especially women of color,

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35. For a deeper dive into Ringer's remarkable career, see Amanda Levendowski, The Lost and Found Legacy of Barbara Ringer, The Atlantic (July 11, 2014), https://www.theatlantic.com/technology/archive/2014/07/the-lost-and-found-legacy-of-a-copyright-hero/373948/ (on file with the *Columbia Law Review*). Lest we give the Copyright Office too much credit for Ringer's groundbreaking appointment, she did have to sue for sex and race discrimination. See Ringer v. Mumford, 355 F. Supp. 749, 751 (D.D.C. 1973).

36. Michelle K. Lee, USPTO (Dec. 22, 2017), https://www.uspto.gov/about-us/michelle-k-lee [https://perma.cc/W3R6-NX77] (last updated June 22, 2021). Lee was also the first person of color to lead the USPTO. See Press Release, Cong. Asian Pac. Am. Caucus, CAPAC Members Applaud Nomination of Michelle K. Lee to Head United States Patent and Trademark Office (Oct. 16, 2014), https://capac-chu.house.gov/press-release/capac-members-applaud-nomination-michelle-k-lee-head-united-states-patent-and [https://perma.cc/BF3M-QHRW].

37. See supra note 30; cf. Renyi Hong, Soft Skills and Hard Numbers: Gender Discourse in Human Resources, Big Data & Soc'y, July–Dec 2016, at 1, 1–2 ("While women are associated to 'soft' skills, the skillsets related to analysis of big data, like programming and statistical analysis, have historically been perceived as 'hard'—rational, analytical skills—believed to be found in men." (citing danah boyd & Kate Crawford, Critical Questions for Big Data, 15 Info., Commc'n & Soc'y 662 (2012)).

38. Arabella Mansfield, admitted to the Iowa Bar, was the first woman lawyer in the United States. See Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 21 (1989). Rhode is one of the fifty most-cited legal scholars—she's ranked forty-five. Shapiro, supra note 34, at 1603.

39. See Roberta D. Liebenberg & Stephanie A. Scharf, Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice 1 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf [https://perma.cc/4QX2-QB2A] (observing that women lawyers make up approximately 45% of incoming Biglaw associates but 20% of equity partners); Joan C. Williams, Marina Multhaup, Su Li & Rachel Korn, Ctr. for Worklife L., You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession 9 (2018), https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-

encounter enough barriers to equity without being aligned with an imprecise term that—intentionally or not—undermines their competence and capabilities. This is perhaps the most insidious aspect of "soft IP": By implying that copyright and trademark work is not hard, the term erases that being a woman in any practice of law can be very hard.[40]

The term "soft IP" contributes to a vicious cycle in which some women pursue trademark and copyright law due to inaccurate stereotypes of

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change-what-you-cant-see-print.pdf [https://perma.cc/R2N3-2Z9T] (discussing women lawyers' compensation disparities along intersectional lines of race and gender); Connie Lee, Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators, 22 Cardozo J.L. & Gender 229, 235–36, 251 (2016) (describing empirical data demonstrating gender bias in the courtroom and recommending ways to resist those biases); Milan Markovic & Gabrielle Plickert, The Gender Pay Gap and High-Achieving Women in the Legal Profession, 47 Law & Soc. Inquiry, 1, 11–13 & tbl.1 (2022) (reviewing empirical data revealing that full-time women lawyers in Texas earn $35,000 less than men, which is unexplained by differences in human capital or occupational segregation); Wilma Williams Pinder, When Will Black Women Lawyers Slay the Two-Headed Dragon: Racism and Gender Bias?, 20 Pepp. L. Rev. 1053, 1060–61, 1067 (1993) (discussing examples of discrimination against women lawyers and lawyers of color and offering interventions for allies to resist biased treatment); Judith Resnik, Gender Bias: From Classes to Courts, 45 Stan. L. Rev. 2195, 2196 (1993) (documenting gender bias from classrooms to courtrooms); Suellyn Scarnecchia, Gender & Race Bias Against Lawyers: A Classroom Response, 23 U. Mich. J.L. Reform 319, 323 (1990) (developing clinical pedagogical discussions about bias against women lawyers and lawyers of color); Hannah Arenstam, A Mother of a Problem: How the Language of Inequality Affects Maternity Leave Policies and Women in Law Firms, Nw. J.L. & Soc. Pol'y, Spring 2017, at 1, 17–21 (detailing gendered shortcomings of law firms' maternity leave policies); Christine Hendrickson, Huge Pay Gap for Women Lawyers: What Firms Can Do, Bloomberg L. (June 16, 2022), https://news.bloomberglaw.com/business-and-practice/huge-pay-gap-for-women-lawyers-what-firms-can-do [https://perma.cc/WD3J-GRPH] (analyzing empirical data revealing that women lawyers' weekly pay is more than twenty-five percent less than men's, and women partners' average compensation is forty-four percent less than men's, which reflects an increase in compensation bias); Lauren Smith, Female Representation in Biglaw Partnership—A Long Way to Go, Above the Law (May 6, 2022), https://abovethelaw.com/2022/05/female-representation-in-biglaw-partnerships-a-long-way-to-go/ [https://perma.cc/844Y-Y2W9] (synthetizing an ABA report on gender disparities in Biglaw).

40. And harder for women of color than white women. See Scarnecchia, supra note 39, app. at 339 ("A minority lawyer's ability to attract and service clients is affected by the quality of treatment afforded the lawyer by judges, court personnel and other lawyers. . . . The apparent ease of access that non-minority lawyers have to judges and court personnel is as detrimental . . . as overt negative behaviors and comments."); Pinder, supra note 39, at 1059 (characterizing discrimination against Black female attorneys in the private sector). For empirical data on those challenges, see Williams et al., supra note 39, at 7–10 (compiling survey data that shows gender-based biases in various aspects of the legal profession); Tsedale M. Melaku, Why Women and People of Color in Law Still Hear: "You Don't Look Like a Lawyer", Harv. Bus. Rev. (Aug. 7, 2019), https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer (on file with the *Columbia Law Review*) (describing the results of "a series of in-depth interviews with black female lawyers in elite law firms," which revealed significant obstacles that these lawyers must overcome to succeed). For examples of challenges specific to copyright and trademark, see supra note 12.

patent practice only to have their work in those fields undermined and undervalued, often by the same people who perpetuated those stereotypes. Without an intervention, the corrosive connotations of "soft IP" cannot be avoided by people who do copyright or trademark work—including me.

As a law student, I wrote a blog focused on copyright, trademark, and privacy law. I said somewhere that I was interested in soft IP. Professor Eric Goldman, who has written his own terrific piece advocating a moratorium on the term "soft IP" due to its definitional, factual, and practical inaccuracies,[41] emailed me and encouraged me not to use the term. I considered why I'd adopted it in the first place. The answer was embarrassing: I'd internalized an ambient message from law firm partners and peers that I couldn't simply express interest in IP because the "real" IP lawyers would think I was a silly woman who couldn't acknowledge my own limitations. Without meaning to, I'd let my passion for copyright and trademark law feel like a compromise rather than a choice. I quickly dropped "soft IP" from my vocabulary.

I pay Professor Goldman's kindness forward to the students who write asking about my "soft IP" work by responding with an abbreviated version of this Piece (and an invitation to chat more over coffee). But I'm still tripped up by the origins of the phrase. As Professor Goldman observed in his piece, the murky etymology of "soft IP" dates to at least 1998, and women's prominence in copyright and trademark practices was well-documented by then.[42] We may never know whether its sexist overtones were purposeful, but "soft IP" has the power to denigrate multiple fields of law and degrade the people who practice them. We cannot continue using this term with our students and colleagues.

"Soft IP" must be retired and replaced. Creating an acronym for copyright and trademark law, like CAT law, risks overstating relationships between those practices while still recognizing patent law as singular. Professor Goldman has offered alternative suggestions: the antonym "non-patent IP" (which still affords patents an unearned place of privilege) or the specificity of naming specialties (which concretely clarifies one's interests or expertise). The latter is often the correct move. I've often said that I do copyright and trademark work. But there's a third way: Lately, I just say that I'm an IP lawyer and professor.[43] And I don't think twice about it.

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41. See Goldman, supra note 7.

42. Id.; see also Hagen, supra note 30, at 141–43 (conducting an ethnographic study of women IP lawyers reflecting on their practices).

43. I've also used the broader "information law" to capture other aspects of my work, including privacy, Communications Decency Act Section 230, the Computer Fraud and Abuse Act, and the Freedom of Information Act. It also catches trade secrecy and right of publicity for the IP completionists.