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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 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 Essay 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 IP” work. They want to know is what it’s like to handle copyright and trademark matters that promote social justice, which I’ve worked on throughout my career. Students in the Georgetown Intellectual Property and Information Policy Clinic, which I founded in 2019, have advised clients, in part, on using copyright and trademark law to promote accessible and equitable library practices, permit repair and modification of personal devices, and appropriate art to critique power. My scholarship uses copyright and trademark law to envision less oppressive technologies, from challenging nonconsensual intimate

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1 Associate Professor of Law, Georgetown University Law Center. Thanks to Sarah Burstein, Kristelia García, Eric Goldman, Megan Graham, Celyra Meyers, Chris Morten, Alex Roberts, Betsey Rosenblatt, and Cameron Tepski for their suggestions and support. Thanks also to all the students who’ve asked me about “soft IP” over the years. Sherry Tseng provided outstanding research assistance.


imagery\(^5\) and countering invasive face surveillance\(^6\) to uncovering secret surveillance technologies.\(^7\) 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.\(^8\) But, unbeknownst to them, doing 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.\(^9\) “Hard” can’t mean that patents only cover inventions connected to the “hard” sciences—like biology, chemistry, and engineering—because both types of patents protect designs with no connection to those fields.\(^10\) Utility

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\(^6\) Amanda Levendowski, Resisting Face Surveillance with Copyright Law, 104 N. C. L. REV. 1015 (2022).

\(^7\) Amanda Levendowski, Trademarks as Surveillance Transparency, 36 BERKELEY TECH. L.J. 4391 (2021); Dystopian Trademark Revelations, 55 CONN. L. REV. (forthcoming 2023).


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. ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 275-278 (U. Chicago Press 2009). 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 doctrines interoperate. Infra note 30; Intellectual Property: The Term, ELECTRONIC FRONTIER FOUNDATION (2023), https://www.eff.org/issues/intellectual-property/the-term. Second, cloaking these doctrines in the language of “property” is a misnomer, if not flat-out misleading. Scholars, including Pam Samuelson and Rochelle Dreyfuss, have long expressed skepticism over rebranding these disparate information law regimes as property given their important differences. Pamela Samuelson, Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?, 38 CATH. U.L. REV. 365 (1989); 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 (1996); Neil W. Netanel, Copyright and a Democratic Civil Society, 106 YALE L.J. 283, 314-21 (1996) (linking IP to Chicago School philosophies); Mark Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031 (2005). Settling this debate extends beyond this Essay, but its use of IP recognizes that undercurrents of dissatisfaction are roiling beneath the term.

\(^9\) 35 U.S.C. § 101 (“[A]ny new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . .”).

patents protect inventions detached from the hard sciences, such as a pool filled with sprinkles. \textsuperscript{11} Similarly, design patents protect aesthetic features disconnected from hard sciences, like the curves of an iPhone. \textsuperscript{12} “Hard” can, however, mean “hard for marginalized people to break into.” \textsuperscript{13}

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. \textsuperscript{14} 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. \textsuperscript{15} There is no comparable barrier to copyright and trademark practice. However, because of these requirements, many students mistakenly believe a technical background is necessary for all patent, or even all IP, work. Many IP clinics’ work, including mine, challenge that misconception—yet it persists.\textsuperscript{16}


\textsuperscript{12} See, e.g., Cynthia Dahl & Victoria F. Phillips, Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics, 25 CLINICAL L. REV. 95 (2018) (documenting variety of IP matters undertaken by more than 70 IP and technology clinics, the vast majority of which require no technical background).
 Scholars have critiqued the USPTO’s gatekeeping and its effects on equity, and the USPTO is responding. The USPTO revisits its Patent Bar requirements, those rules continue driving perception and practice in ways that have measurable, exclusionary effects on women. According to recent empirical work by Elaine Spector and LaTia Brand, women registrants with the Patent Bar were virtually nonexistent until the early 1980s. Today, women comprise more than half of incoming law school classes, yet only 16.48% of registered patent attorneys. For women of color, the statistics are even starker: there are more patent attorneys and agents named “Michael” than racially diverse women, who compose only 1.7% of registered patent attorneys and agents. But no matter how hard it is for women to


20 Id.

join the Patent Bar, I’ve never heard “hard IP” 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?”

Not the application of copyright and trademark to intangibles, as copyright cannot cover ideas and both copyrighted works and trademarked goods are routinely embodied in physical forms. And not because copyright and trademark are doctrinally easier. When can an artist use another artist’s work? When does a commercial product constitute a Constitutionally protected parody? 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

U.S. Women Patentees? Assessing Three Decades of Growth, U.S. PATENT & TRADEMARK OFFICE (Oct. 2022), https://www.uspto.gov/sites/default/files/documents/oce-women-patentees-report.pdf. 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. Women in the Copyright System: An Analysis of Women Authors in Copyright Registrations from 1978-2020, UNITED STATES COPYRIGHT OFFICE (2020) https://www.copyright.gov/policy/women-in-copyright-system/Women-in-the-Copyright-System.pdf. (For data on race and age, as well as gender, see Robert Brauneis + Dotan Oliar, Copyright’s Race, Gender and Age: A First Qualitative Look at Registrations, GWU LAW SCHOOL PUBLIC LAW RESEARCH PAPER NO. 2016-48 (2016)). 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 and women of color. Kara W. Swanson, Centering Black Women Inventors: Patcing and the Patent Archive, 25 STAN. TECH. L. REV. 305 (2022). See also Debora Halbert, Feminist Interpretations of Intellectual Property, 14 Am. U.J. Gender Soc. Pol’y & L. 431 (2006) (exploring when and how IP can be coded as masculine by developing a feminist epistemology). Recently, the USPTO experimented with pilot programs to support women inventors seeking patents, which had a positive impact on closing the patent acquisition gender gap: women’s probability of obtaining a patent was 11% higher due to the program. Colleen V. Chien, Rigorous Policy Pilots: Experimentation in the Administration of the Law, 104 IOWA L. REV. 2313 (2019); Nicholas A. Pariolero, Andrew Toole, Peter-Anthony Pappas, Charles DeGrazia, Mike Teodorescu, Closing the Gender Gap in Patenting: Evidence From a Randomized Control Trial at the USPTO, USPTO ECON. WORKING PAPER 1 (2022). These programs do not, however, close the gender gap for patent prosecution.


23 See, e.g. OCTAVIA E. BUTLER, PARABLE OF THE SOWER (Seven Stories Press 2017) (published copyrighted work embodied as book); ANDY WARHOL, BRILLO BOXES (1964) (artistic appropriation of trademark emblazoned on boxes).

24 See Andy Warhol Found. for the Visual Arts v. Goldsmith, No. 21-869 (2022), https://www.scotusblog.com/case-files/cases/andy-warhol-foundation-for-the-visual-arts-inc-v-goldsmith/ (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).

Progress Clause, which empowers Congress to “promote the Progress of the Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”26 Another option is by governance. Only patent and trademark registration and appeals are handled by the USPTO.27 Another choice would be embracing the urban legend that “soft IP” alludes to copyright protection of software.28 Except all three forms of IP protect software in different ways.29 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 patent. And on that basis, some (but not all) people extend “soft IP” to include right of publicity and trade secrecy.30

“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 higher numbers of women practitioners, partners, and professors than patent, and fields that do so are routinely dismissed as “soft.”31 In

26 U.S. Const. Art. 1, Sec. 8, Cl. 8. Trademarks are instead derived from the Commerce Clause. U.S. Const. Art. 1, Sec. 8, Cl. 3. The first federal trademark law was not enacted until 1870, decades after the Progress Clause was drafted. Lorelei D. Ritchie, 70 Am. U. L. Rev. 1331 (2021).


30 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. Hepp v. Facebook, Nos. 20-2725 & 2855 (Sept. 23, 2021). Eric Goldman also teased out this issue in his takedown of the term “soft IP.” Eric Goldman, Let’s Stop Using the Term “Soft IP,” TECHNOLOGY + MARKETING LAW BLOG (Jan. 8, 2013), https://blogericgoldman.org/archives/2013/01/a_phrase_to_ret.htm.

31 Kam 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 (1999). More than a decade later, the trend continues. Among IP boutiques, Fross Zelnick, which specializes in copyright and trademark work, is the lone firm that boasts better-than-parity among associates (52%) and comparatively high numbers of women partners (32%). Bill Donahue, IP Boutiques Still Among Worst for
private practice, women report working with more women, both as peer practitioners and as partners, in copyright and trademark groups. In academia, half of the 20 most-cited IP scholars are women. More than half of those women scholars frequently focus on copyright and trademark law. (For comparison, there are zero women in the top 20 most-cited scholars within legal academia generally.) And in leadership roles, women rose to the highest levels of the Copyright Office well before the USPTO. Barbara Ringer was the first woman Register of Copyright, and she was appointed in 1973. The first woman to direct the USPTO—Michelle K. Lee, who has a technical background—was appointed decades after Ringer in 2015. Women


34 See, e.g., Pamela Samuelson, Allocating Ownership Rights in Computer-Generated Works, 47 U. Pitt. L. Rev. 1185 (1986) (predicting the present obsession with whether copyrights can and should be granted to computer-generated works); Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. DAVIS L. REV. 1151 (2007) (offering a model of artistic and intellectual creativity that emerges from dynamic interactions of individual, social, and cultural patterns); Rebecca Tushnet, My Fair Ladies: Sex, Gender, and Fair Use in Copyright, 15 AM. U. J. GENDER, SOC. POLY + L. (2007) (discussing the law favors sexualized critique as fair use over other forms of commentary); Amy Adler & Jeanne C. Froemer, Memes on Memes and the New Creativity, 97 N.Y.U. L. REV. 543 (2022) (analyzing how Internet memes upend assumptions about creativity, commercialization, and copyright); JANE GINSBURG, DEEP DIVE: BURROW-GILES LITHOGRAPHING V. SARONY (US 1884): COPYRIGHT PROTECTION FOR PHOTOGRAPHS AND CONCEPTS OF AUTHORSHIP IN AN AGE OF MACHINES (Twelve Tables Press 2020) (reflecting on the relatively modern recognition of photographs as copyrightable works); JESSICA LITMAN, DIGITAL COPYRIGHT (Michigan Pub. Servs. 2017) (detailing the status of digital copyright law and predicting its future).

35 Or the top 39—the only two top-cited women scholars are both feminist scholars: Catharine MacKinnon (ranked 40) and Deborah Rhode (ranked 45). Fred R. Shapiro, The Most-Cited Legal Scholars Revisited, 88 U. CHI. L. REV. 1595, 1692 (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. W. Nicholson Price II + Jonathan Tietz, Acknowledgements as a Window Into Legal Academia, 98 WASH. U. L. REV. 307 (2020). For a deeper dive into the homogeneity of legal academia, see Meera E. Deo, Looking Forward to Diversity in Legal Academia, 29 BERKELEY J. GENDER, L. + J. (2014). Legal scholars seeking to counter such biases can incorporate feminist cyberlaw citation methods into their work. Amanda Levendowski, Just Citation, 39 BERKELEY J. GENDER, L. + J. (forthcoming 2024).


37 Michelle K. Lee, U.S. PATENT + TRADEMARK OFFICE (2022), https://www.uspto.gov/about-us/michelle-k-lee. Lee was also the first person of color to lead the USPTO.
practitioners, professors, and 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.38 “Soft IP” carries on this tradition by not-so-subtlety 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 1869,39 and we are still paid less, promoted less, and punished more for our parenting decisions and practice skills.40 Women, especially women of color, encounter enough barriers to equity

38 Supra note 32; Renyi Hong, Soft Skills and Hard Numbers: Gender Discourse in Human Resources, 13 BIG DATA & SOC’Y 1 (2016) (detailing how “normative perceptions of feminine “soft skills’ are seen as irreconcilable with the masculine “hard numbers” of a data-driven epistemology”).


40 Milan Markovic & Gabriele Plickert, The Gender Pay Gap and High-Achieving Women in the Legal Profession, LAW & SOCIAL INQUIRY (2022) (reviewing empirical data revealing that full-time women lawyers in Texas earn $35,000 less than men that cannot be explained by differences in human capital or occupational segregation); Christine Hendrickson, Huge Pay Gap for Women Lawyers: What Firms Can Do, BLOOMBERG (June 16, 2022), https://news.bloomberglaw.com/business-and-practice/huge-pay-gap-for-women-lawyers-what-firms-can-do (analyzing empirical data revealing that women lawyers’ weekly pay is more than 25% less than men’s, and women partners’ average compensation was 44% less than men’s, which reflects an increase in compensation bias); You Can’t Change What You Can’t See: Interrupting Racial + Gender Bias in the Legal Profession: Executive Summary, AM. BAR ASSO. COMM’N ON WOMEN IN THE PROFESSION (2018), https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf (discussing women lawyers’ compensation disparities around intersectional issues around race and gender); Roberta D. Lienbenberg & Stephanie A. Scharf, Walking Out the Door: Facts, Figures, and Future of Experienced Women Lawyers in Private Practice, AM. BAR ASSO. (2022), https://www.americanbar.org/products/inw/book/391971040/ (observing that women lawyers generally make up to 50% or more of incoming Biglaw associates but 30% or fewer partners; Ropes & Grey was a standout promoter of women with only 31.8% women partners); 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/ (synthesizing ABA report on gender disparities in Biglaw); Hannah Arentnam, Mother of a Problem: How the Language of Inequality Affects Maternity Leave Policies and Women in Law Firms, 12 NW. J. L. & SOC. POL’Y 1 (2017) (detailing gendered shortcomings of law firm); Suslyn Scarneccia, Gender + Race Bias Against Lawyers: A Classroom Response, 23 U MICH. J.L. REFORM 319 (1989) (developing clinical pedagogical discussions about bias against women lawyers and lawyers of color); Judith Resnik, Gender Bias: From Classes to Courts, 45 STAN. L. REV. 2195 (1992) (documenting gender bias from classrooms to courtrooms); Wilma Williams Pinder, When Will Black Women Lawyers Slay the Two-Headed Dragon: Racism and Gender Bias?, 20 PEPPI. L. REV. 1053. (1993) (discussing examples of discrimination against women lawyers and lawyers of color and offering interventions for all to resist biased treatment); Connie Lee, Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators, 22 CARDOZO J.L. + GENDER 229 (2015) (describing empirical data demonstrating gender bias in the courtroom and recommending was to resist those biases). Much of the scholarly conversation around
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 easy, the term erases that being a woman in any practice of law is hard. 41

Without an intervention, the corrosive connotations of “soft IP” cannot be escaped 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,” emailed me and encouraged me not to use the term. 42 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 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 Essay (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. 43 We may never know whether its sexist overtones were purposeful, but it hardly matters now. “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).

gender bias is focused on Biglaw or other firm environments; for a deeper dive into gender bias in legal academia, see Meera E. Deo, Unequal Profession: Race and Gender in Legal Academia (Stanford U Press. 201).


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. And I don’t think twice about it.

44 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 purists.