

# IPL Standard

*A Publication of the Intellectual Property Law Society of Notre Dame Law School*

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## Introducing the Intellectual Property Law Society

*IPLS STANDARD – ND Law’s New IP Resource!*

It is with great pleasure that we introduce Notre Dame Law School to the Intellectual Property Law Society, and to the Inaugural Issue of the STANDARD.

Intellectual property law is dynamic and stimulating, and its significance is growing. According to the ABA IP Law Section, it “has undergone more changes in the last few years than at any other time in its history.” Our goal is to be a part of the history to come.

Fall 2001 was our first active semester, and we expect to be active well into the future. We believe the Society and the STANDARD will enable the Law School Community to discover the different facets of IP law and its practice. The Society is thankful for the opportunity to encourage appreciation for research, innovation, and the arts in economics, in society, and in law. ✦

**Navid Fanaeian**  
President

## Prof. Bauer Provides Insight into Intellectual Property

*Professor Bauer, thank you for taking time to meet with us. One goal of the Intellectual Property Law Society is to serve as a resource to the Notre Dame Law community. So to begin, just what is intellectual property?*

Intellectual property consists of three major components: patent law, copyright law, and trademark law. There are other areas including right of publicity, right of privacy, misappropriation, all of those arising under state law, but the first three are the main bodies.

*Would you give examples of what is protected by copyrights, patents and trademarks?*

The principal source of patent protection is the kind of thing we think of as inventions, whether it’s a product, a process, or device, something that is new, useful and non-obvious. Those are the criteria for patent protection. Patent protection lasts for a finite period. Now it’s for 20 years from the date of filing the patent application.

Copyright gives you protection for expression of ideas. It is expressly said in the copyright law, it does not protect ideas, processes, etc. Among the things that are the subject of copyright protection are works of literature, including novels, short stories, plays, and poems; works of visual art, paintings, and other media; three-dimensional works, including sculptures; motion pictures; musical works; and sound recordings - a variety of, if you will, works of authorship.

A trademark is a name, symbol or device used to identify or distinguish the goods or services of a particular source. So that it could be the name “McDonalds,” the “Golden Arches,” the particular shape of the Coca-Cola bottle, the uniform of the Avis Rent-a-Car people, or the shape of the product itself.

*Bauer dialogue continued on page 3...*

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# Will Bioterror Breed New Appreciation for the Internet?

*U.S.P.T.O. and Copyright Office Encourage Electronic Filing and Email Correspondence Instead of U.S.P.S. Mail*

On November 5, the USPTO announced that testing had found its offices anthrax free.<sup>2</sup> But in light of U.S. Postal Service (“USPS”) delays and branch closings resulting from anthrax scares, the Office announced two days later that “Trademark Customers [Are] Encouraged to Use E-Mail,” citing “disruption of mail service in some areas and concerns related to the safety of handling mail.”<sup>3</sup> Two days following that announcement, it “strongly encouraged new trademark and patent applicants to be filed over the Internet,” and it has since posted temporary addresses for, among other uses, “Express Mail” delivery.<sup>4</sup> Some of the policies related to use of email may be found in MPEP §502.03, “Communications via the Internet.”<sup>5</sup>

Reference to “Express Mail” is no accident.<sup>6</sup> In non-emergencies, the stamped filing date (“Office Date”) of correspondence with the USPTO is the date of receipt, regardless of how it was transmitted.<sup>7</sup> But one exception provides that appropriately labeled correspondence via “Express Mail” benefits from the Office Date of the day on which it was deposited with the Postal Service.<sup>8</sup> In order to benefit from this exception, however, the mail may only be sent through the U.S. Postal Service and no other carrier like Federal Express, DHL, or UPS.<sup>9</sup> Consequently, if a branch of the USPS is closed, an applicant cannot resort, without forfeiting the benefit, to a carrier not experiencing delays.

This is in fact what has happened. The Copyright Office’s home page states “mail from the [USPS] is taking additional time to arrive in the Copyright Office. Private carrier express shipments generally are arriving without delay.”<sup>10</sup> But the Copyright Office is distinct from the USPTO, so its observations and recommendations are not likely to help patent and trademark applicants. Trademark applications, for example, are still not accepted via email and must be submitted electronically on the Web or using ordinary mail.<sup>11</sup> So any email sent because of the USPTO announcement must refer to an application already filed.<sup>12</sup> If need be, nevertheless, those who attempt to file via “Express Mail” and can show they failed due to “extraordinary circumstances” can make a petition (under sections 2.146(a)(5) and 2.148 for trademark applications, and section 1.183 for patent applications, of 37 C.F.R.) for the earlier Office Date.<sup>13</sup> ♦

## NOTES

<sup>1</sup> Just as lawyers look to legal standards to assess a client’s situation, scientists use standards in measuring and analyzing empirical data. Visit the site of the National Institute of Standards and Technology at [www.nist.gov/](http://www.nist.gov/) to learn more. The Institute’s mission is “To develop and promote measurement, standards, and technology to enhance productivity, facilitate trade, and improve the quality of life.”

<sup>2</sup> This announcement by the United States Patent and Trademark Office (“USPTO” or “Office”) can be found on its Web site at [www.uspto.gov/september11/anthraxfree.htm](http://www.uspto.gov/september11/anthraxfree.htm).

<sup>3</sup> The [www.uspto.gov/september11/tmemailnotice.htm](http://www.uspto.gov/september11/tmemailnotice.htm) notice cites [www.uspto.gov/teas/index.html](http://www.uspto.gov/teas/index.html) for more information.

<sup>4</sup> Available at <http://www.uspto.gov/emergencyclosure.htm>.

<sup>5</sup> “MPEP” refers to the MANUAL OF PATENT EXAMINING PROCEDURE, a reference for patent examiners, applicants, attorneys, agents, and representatives of applicants, related to USPTO practices and procedures in the patent application process. Although the Manual does not have the force of law or the force of the rules in Title 37 of the Code of Federal Regulations (“C.F.R.”), it is indispensable in dealing with the USPTO. Refer also to *Internet Usage Policy*, 64 F.R. 33056 (June 21, 1999).

<sup>6</sup> The role of the USPS in patent and trademark applications is in part discussed in MPEP §513. More information can be found at 37 C.F.R. §1.6 (Receipt of correspondence), §1.8 (Certificate of mailing or transmission), and §1.10 (Filing of correspondence by Express Mail).

<sup>7</sup> Section 1.6(a) of 37 C.F.R. discusses this further.

<sup>8</sup> The “Express Mail” exception is discussed in §1.10 of 37 C.F.R. Another exception, found at §1.8 of 37 C.F.R., provides, for the purpose of making filing deadlines only, that if a proper “Certificate of Mailing or Transmission” for a filing is received by a deadline, it is considered timely with respect to that deadline even though the certified mail may not arrive at the Office until after the deadline has passed. However, even though the filing is considered on time, it is nonetheless stamped with an Office Date according to the day it is actually received at the Office.

<sup>9</sup> The USPS requirement for the benefit is discussed in MPEP §512.

<sup>10</sup> The Copyright Office Web site is at <http://lcweb.loc.gov/copyright/>.

<sup>11</sup> Instructions for electronic filing of applications are available at [www.uspto.gov/teas/index.html](http://www.uspto.gov/teas/index.html).

<sup>12</sup> Regarding patents, for security and confidentiality reasons an applicant is required to authorize email correspondence vis-à-vis the USPTO in writing. For more information, see Article 5 of the *Internet Usage Policy*, 64 F.R. 33056 (June 21, 1999), addressing the confidentiality requirements of 35 U.S.C. 122.

<sup>13</sup> See “U.S. Postal Service Interruptions” in the Official Gazette (which is published by the USPTO) of October 9, 2001, available at [www.uspto.gov/web/offices/com/sol/og/2001/week41/og200141.htm](http://www.uspto.gov/web/offices/com/sol/og/2001/week41/og200141.htm).

<sup>14</sup> Brown & Michaels, PC, Comments of Mark Twain on Copyright Term, 2001, available at <http://www.bpmlegal.com/cotwain.html>.

<sup>15</sup> Kevin MacDonnell, *Collecting Mark Twain: A History and Three New Paths*, FIRSTS MAGAZINE, INC., ch. 5, 1998, available at <http://abaa.org/collectors/bc-twain5.html>.

<sup>16</sup> Margalit Fox, *The Rights of Writers As a Twain Obsession*, NEW YORK TIMES, February 16, 1998, available at <http://homepages.nyu.edu/~sv24/GRPSTimes.html>.



# Twain, Congress & Copyright

Although copyrights have received considerable attention from Congress in the wake of the 1998 Digital Millennium Copyright Act (DMCA), the subject is by far not a new one for the American government. In fact, the debate over the rights of artists, authors, and musicians, to own their works and to be compensated fairly for them led to the creation of an iconographic figure - Mark Twain and his white flannel suit.

While his attire that day has been inseparable from his popular image, Samuel Longhorne Clemens' appearance before the Committee on Patents of the Senate and the House on the afternoon of December 7, 1906, had important intellectual property implications as well. Speaking on behalf of authors regarding a pending bill that would have extended the duration of a copyright beyond forty-two years, Twain stated that the laws in existence would "always talk handsomely about the literature of the land, always what a fine, great, monumental thing a great literature is, and in the midst of their enthusiasm they turn around and do what they can to discourage it."<sup>14</sup>

Although he desired copyright protection in perpetuity, he voiced his support for a measure that would have increased the coverage to the author's life plus fifty years. In his speech, he reiterated the arguments that had persuaded England's House of Lords to sign an international copyright agreement in 1891, which halted British and Canadian piracy of his works.<sup>15</sup> Even with his backing, however, that 1906 Copyright bill was defeated. While Congress did pass a slightly less forceful version three years later, American authors would not receive the extension for which Twain lobbied until the passage of a DMCA precursor, the Copyright Revision Act of 1976.<sup>16</sup> ❖

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*An inventor is a poet--a true poet--and nothing in any degree less than a high order of poet--wherefore his noblest pleasure dies with the stroke that completes the creature of his genius, just as the painter's & the sculptor's & other poets' highest pleasure ceases with the touch that finishes their work--& so only he can understand or appreciate the legitimate 'success' of his achievement, little minds being able to get no higher than a comprehension of a vulgar moneyed success.*

*- Mark Twain, Letter to Pamela Moffett, 6/12/1870*

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. . . Bauer dialogue continued from page 1

*Do you need a technical background to practice intellectual property law, and especially given the current job market, what career opportunities are available in this area?*

You probably need some kind of a scientific or engineering background to do patent law. Although that doesn't necessarily mean that you have to have a scientific or engineering major, but it is probably important to at least have had some science courses as an undergraduate. The other two - copyright and trademark practice - require no particular specialty.

In terms of career opportunities, intellectual property is certainly one of the growth areas of the practice of law. Firms are expanding their intellectual property practices. There is considerably more hiring that's taking place there than in a number of other fields.

*We understand that there are intellectual property writing contests. Do you have some information in this regard?*

There are number of them. The most prominent one is sponsored by ASCAP, the American Society of Composers, Authors and Publishers. They sponsor an annual competition in the copyright area. They award two prizes at every law school, first prize \$600 and second prize \$250, for the first and second place papers in every law school. I always encourage our students to think about writing a paper in the area and submitting it to that competition.

*You will be on a leave of absence next term. What are your plans?*

I'm going to work for a law firm in Washington, D.C., Kirkland & Ellis, and be involved in their litigation practice. I'll be doing a variety of different things, which I guess will be defined by the needs of the firm, as they arise, but I assume that they will involve some antitrust issues and then some intellectual property related issues. I actually have been working with the Chicago office since Spring on a trademark and trade dress case, which happens to be pending here in the Northern District of Indiana and is scheduled to go to trial in February next year. So I expect I'll continue to work on that, among other things.

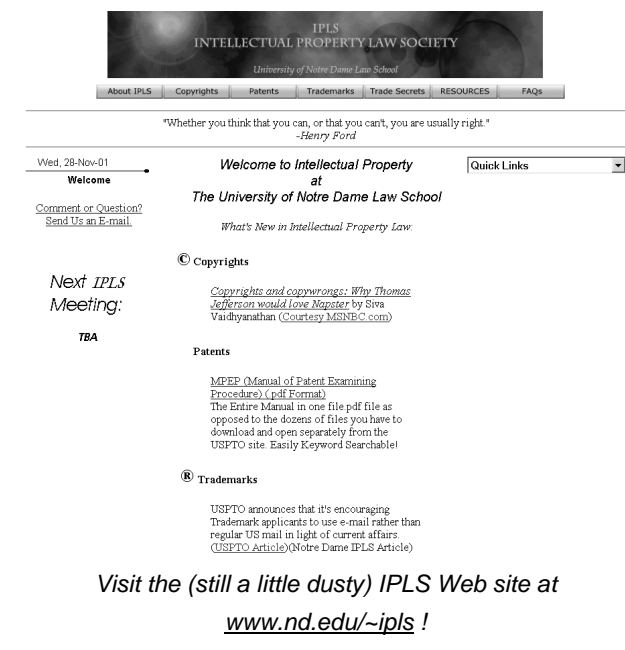
*Are your students invited [to see you in action]?*

Sure! Absolutely! All expenses to the courtroom downtown.

*Thanks again for meeting with us.*

\*\* We would like to thank Professor Bauer for his guidance and we wish him well in Washington! ❖

## Check Out Our Website!



The screenshot shows the IPLS website homepage. At the top, there is a navigation menu with links for About IPLS, Copyrights, Patents, Trademarks, Trade Secrets, RESOURCES, and FAQs. Below the menu is a quote: "Whether you think that you can, or that you can't, you are usually right." -Henry Ford. The main content area is titled "Welcome to Intellectual Property at The University of Notre Dame Law School" and includes sections for "What's New in Intellectual Property Law", "Copyrights" (with a link to "Copyrights and Copyrights: Why Thomas Jefferson would Love Napster by Siva Vaidyanathan"), "Patents" (with a link to "MPEP Manual of Patent Examining Procedures"), and "Trademarks" (with a link to "USPTO announces that it's encouraging Trademark applicants to use e-mail rather than regular US mail in light of current affairs"). At the bottom, there is a call to action: "Visit the (still a little dusty) IPLS Web site at [www.nd.edu/~ipls](http://www.nd.edu/~ipls) !"

## WWW SITES OF INTEREST

A CONVERGENCE OF SCIENCE & LAW: A SUMMARY REPORT OF THE FIRST MEETING OF THE SCIENCE, TECHNOLOGY, & LAW PANEL ISBN: 0-309-07584-X (read it online *for free*): [www.nap.edu/catalog/10174.html](http://www.nap.edu/catalog/10174.html)

ALCS Authors' Licensing and Collecting Society (U.K.): <http://www.alcs.co.uk/>

ASCAP American Society of Composers, Authors, and Publishers, "protects the rights of its members ... for the non-dramatic public performances of their copyrighted works:" <http://www.ascap.com/>

Author's Registry, a nonprofit organization that has been called "ASCAP for writers:" [www.webcom.com/registry/](http://www.webcom.com/registry/)

Copyright Clearance Center: [www.copyright.com/](http://www.copyright.com/)

EFF Electronic Frontier Foundation: [www.eff.org/](http://www.eff.org/)

IPLS Links Page: [www.nd.edu/~ipls/resources\\_links.html](http://www.nd.edu/~ipls/resources_links.html)

U.S. Copyright Office: <http://lcweb.loc.gov/copyright/>

U.S.P.T.O. United States Patent and Trademark Office [www.uspto.gov/](http://www.uspto.gov/)

## Call for Submissions

IPLS invites you to submit your writing for publication in an upcoming issue of the IPLS STANDARD. Articles summarizing IP related cases, current events, historical accounts, reviews of books, articles, and other publications are welcomed, as are opinion-editorial pieces. Email submissions to [ipls@nd.edu](mailto:ipls@nd.edu) or place them in Elizabeth Holman's box. Please remember to cite your sources when appropriate, and always credit authors when referring to the works or ideas of others.

## Patents & Notre Dame

*The UND Statement on Patents and Invention @ [www.nd.edu/~research/TechTransfer/inventors.htm](http://www.nd.edu/~research/TechTransfer/inventors.htm):*

### Your technology will help Notre Dame:

- show sponsors and taxpayers the benefits of fundamental research
- attract new faculty and students
- generate industrial support of research
- produce discretionary income
- bring about new job opportunities for graduates

*Visit the Available Technologies Page at [www.nd.edu/~research/TechTransfer/available.html](http://www.nd.edu/~research/TechTransfer/available.html) to learn more about the University's patents.*

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