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Elizabeth A. Rowe

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FOREWORD

TECHNOLOGY AND INTELLECTUAL PROPERTY: NEW RULES FOR AN OLD GAME?

*Elizabeth A. Rowe**

Technology has affected the way we live, work, and play. The technological revolution that we have experienced in the last few years has implications for almost every area of law, not the least of which is intellectual property. This new technological revolution is being driven by information, rather than by the industrialized processes of earlier periods.¹ Accordingly, the ways in which we develop, use, store, and communicate information with technology has become a major driving force for our economic and social lives. Intellectual property law plays a central role in this new technological revolution because it is a legal regime for controlling information.² Indeed, this technological revolution has brought a certain prominence to intellectual property law, and every area of intellectual property (copyright law, patent law, trademark law, and trade secret law) is now closer to the consciousness of the public, legislators, and courts as a result.

An important, yet unaddressed, broader question presented by the merger of technology and intellectual property is how best the two areas should co-exist. The Internet alone continues to push the boundaries of our long established methods of legal regulation.³ Moreover, technology in general poses many challenges to the existing intellectual property paradigms and doctrines. These challenges are reflected, for example, in the complex issues presented by software and patenting,⁴ search engines and trademarks,⁵ digital technology and

* Associate Professor of Law, University of Florida, Levin College of Law. My thanks to Constance Jones for her research assistance.

1. See Margaret Ann Wilkinson, *The Public Interest in Moral Rights Protection*, 2006 MICH. ST. L. REV. 193, 212-13 (2006).

2. *Id.*; see also David Abraham, *Suggestions for Improved Intellectual Property Protection of Software, or Where is Alexander When You Really Need Him?*, 23 S.U.L. REV. 293, 293-94 (1996).

3. See Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright*, 7 CAN. J. L. & TECH. 1, 6-7 (2009).

4. See, e.g., Peter S. Menell, *Patents and Diversity in Innovation Policy Conference: A Method for Reforming the Patent System*, 13 MICH. TELECOMM. & TECH. L. REV. 487, 506-07 (2007) (discussing software and business method patents); Robert Hulse, Note, *Patentability of Computer Software After State Street Bank & Trust Co. v. Signature Financial Group*, 33 U.C.

copyright,⁶ and the Internet and trade secrets.⁷ Fortunately, our common law system provides great flexibility for tackling these difficult issues. With this flexibility, however, comes the burden of choice, and perhaps the attendant need for guiding principles that might avoid haphazard solutions.

This era of technological change is not the first time that the law has had to adapt to such wide reaching economic forces. Indeed, this period of change is in some ways reminiscent of the Industrial Revolution, which transformed the way business was done, and required changes in such areas as banking law and sales.⁸ The existing law did not fit the newly developed modes of commerce, so the law changed.⁹ Notably, the Industrial Revolution is also tied to the early rise of intellectual property law,¹⁰ as the period facilitated the spread of knowledge among industries from agriculture to medicine.¹¹ We may therefore be able to learn some useful lessons from the legal developments at that time that could provide guidance on the ways to approach the coexistence of intellectual property and technology today. At the very least, we can benefit from the post-Industrial Revolution

DAVIS L. REV. 491, 492 (2000) (discussing how computer software has presented challenges for the patent system).

5. See, e.g., Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1391-98 (2008) (criticizing the current application of trademark law to search engines); Jacqueline D. Lipton, *Who Owns "Hillary.Com"?* *Political Speech and the First Amendment in Cyberspace*, 49 B.C. L. REV. 55, 57-58 (2008) (discussing domain name registration in the political context).

6. See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264-65 (2002) (discussing debate over the scope of copyright law arising from digital technology).

7. See generally Elizabeth A. Rowe, *Saving Trade Secret Disclosures on the Internet Through Sequential Preservation*, 42 WAKE FOREST L. REV. 1, 14 (2007) (explaining that trade secret status can be lost when trade secrets appear on the Internet); Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets* 19-30 (May 1, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1161166> (discussing threats to trade secrets posed by modern technological tools).

8. See Courtney Lytle Perry, *My Kingdom for a Horse: Reining in Runway Legislation from Software to Spam*, 11 TEX. WESLEYAN L. REV. 523, 543 (2005).

9. *Id.* at 545-46.

10. See, e.g., Charles Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 TEX. INTELL. PROP. L.J. 387, 404-05 (2007) (discussing the rise of trade secret law during the Industrial Revolution); see also Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 290 (2004) (discussing patents and copyright at the end of the nineteenth century).

11. See Lea Bishop Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 J.L. & POL'Y FOR INFORMATION SOC'Y 235, 240-41 (2008) (discussing the effect of the spread of knowledge in agriculture, industry, and medicine during the Industrial Revolution).

view of law as a process,¹² and accept that over time we will develop appropriate solutions that build on the intellectual property law paradigms developed during the Industrial Revolution.¹³

How should we resolve the perceived clashes between new technologies and existing intellectual property frameworks? Should intellectual property stand firm to its traditional boundaries or should technology push aside the “old” regime created by intellectual property and create its own rules? As we tackle these problems, there are a number of possible approaches. One approach may adopt a view that intellectual property law should always change to accommodate new technology. At the opposite end of the spectrum, a second approach may advocate keeping intellectual property as is, regardless of the pressures to conform presented by technology. Finally, the middle ground may suggest changing the law only when necessary.

In the end, there is no one-size-fits-all solution, and each area of intellectual property does not exist in isolation from the other, or from other fields of law.¹⁴ While it may not be wise for courts and legislators to react impulsively to change the law based on the facts of individual cases, we must be willing to recognize and fill gaps in the law. Sometimes it is wise to apply old rules to new problems. One court has noted, for instance, that “[t]he Internet, as a mode of communication and as system of information delivery is new, but the rules governing the protection of property rights, and how that protection may be enforced under the new technology, need not be.”¹⁵ At other times, however, when presented with a square-whole-round-peg phenomenon, it is an indication that a gap exists, and that new intellectual property paradigms may be needed.¹⁶

12. See Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197, 1228-29 (2006).

13. See Abraham, *supra* note 2 at 305.

14. We must be careful about bleeding among the various areas of intellectual property as well as over-reaching. For example, the lines are blurring between trade dress and design patents, and between the rights provided by copyright law in the anti-circumvention provisions of the Digital Millennium Copyright Act and patent protection. Moreover, when we modify intellectual property law we could affect other areas of the law, including, for instance, the contours of the First Amendment jurisprudence.

15. *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909, 912-13 (Cal. Ct. App. 2001).

16. See, e.g., Elizabeth A. Rowe, *Introducing a Takedown for Trade Secrets on the Internet*, 2007 WIS. L. REV. 1041, 1042-46 (2007) (identifying a void in trade secret law and proposing a legislative mechanism to request a take down of trade secrets on the Internet).

The issues that arise at the intersection of intellectual property law and technology lead to countless difficult and important questions. The area continues to be fertile ground for further scholarly inquiry, and approaching each piece of the puzzle with a view toward the larger picture may prove most efficient and effective. As Judge Richard Posner has aptly noted, “[t]he future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.”¹⁷ All of us as scholars, practitioners, legislators, jurists, and students, are privileged to be participants and players in this time of unprecedented developments as new technologies challenge us to examine our positions in and about intellectual property.

17. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991).