

Sex Exceptionalism in Intellectual Property

Jennifer E. Rothman

Professor of Law and Joseph Scott Fellow, Loyola Law School

jennifer.rothman@lls.edu | [Bio](#) | [SSRN](#)

The state regulates sexual activity through a combination of criminal and civil sanctions and the award of benefits, such as marriage and First Amendment protections, for acts and speech that conform with the state's vision of acceptable sex. Although the penalties for non-compliance with the state's vision of appropriate sex are less severe in intellectual property law than those, for example, in criminal or family law, IP law also signals the state's views of sex. In this Article written for the Stanford symposium on the Adult Entertainment industry, I extend my consideration of the law's treatment of sex after *Lawrence v. Texas* to the context of intellectual property.

Sex has long played a role in determining the scope of IP protection, especially in the context of copyright and trademark law. At common law, works, inventions, and marks deemed sexually explicit or simply suggestive were denied the protection of the law. Even today they remain disfavored in some contexts. In this Article, I consider and critique some of the ways IP law continues to devalue and channel sex. Part I of the article considers trademark law's explicit and implicit disfavoring of sexual content. This is most evident in trademark dilution law, where courts have read in an explicit prohibition on using marks or colorable imitations in sexual contexts. Part II analyzes the ways that copyright law continues to treat works with sexual content differently and sometimes less favorably than other works. Finally, Part III situates IP law's treatment of sex in a broader critique of the law's sex exceptionalism and normativity. Using copyright and trademark to channel sex provides yet another avenue for the law (and in this case art and commerce) to shape a vision of sex that is narrow, discriminatory, pejorative, and exclusionary. A consideration of the treatment of sex in IP highlights some of the dangers of the differential treatment of sex in general and also some of the pitfalls of using the IP system to further goals unrelated to its core missions. Ultimately, works, marks, and uses of them should not be disfavored solely because they have sexual content nor should courts be in the business of assessing what constitutes good or bad sex.

The full paper is available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104419