

Selling Information

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The boundaries between the distinct subfields of intellectual property—and in particular between trademark on the one hand and patent or copyright on the other—are under increasing strain. As copyrighted works fall out of the public domain, cases like *Dastar v. Twentieth Century Fox* and *Fleischer Studios v. A.V.E.L.A.* will increasingly test the boundaries between trademark and copyright. And as useful products take on social connotations and the rents flowing from patent monopolies continue to increase, the boundary between patent and trademark has come under strain in functionality cases from *Traffix Devices vs. Marketing Displays* to *Louboutin v. Yves Saint-Laurent*. There is an ad hoc quality to the courts' approaches to these boundary problems, rendering the boundaries themselves unstable. Some theoretical support for the decisions in individual cases is warranted.

In this article I hope to begin to provide such support. I will argue that the distinction between trademark rights on the one hand and patent or copyright rights on the other can be discerned by examining the role of information in the transactions the parties to these boundary disputes are engaged in. I submit that trademark law is less about incentivizing the laborious creation and dispersal of *new* information (which then itself becomes the subject of commercial exchange, as in copyright and patent) than it is about regulating the flow of information that *already exists*, as an aid to the completion of transactions in goods and services *other than* the information in question. Therefore, I propose a distinction between claims to rights in information that has value *in itself* and claims to rights in information that has value only as an adjunct to transactions in *other goods or services*. Where the claimed subject matter is information that has value in itself, the intellectual property right at stake must be either a patent or a copyright, and is subject to all the limitations of those forms of intellectual property. Where the claimed subject matter has value only in the context of a transaction in some other good or service, the intellectual property right at stake must be a trademark, and is subject to all the limitations of trademark law.

This simple distinction has far-reaching implications, particularly for the scope of competition. Recognizing intellectual property rights in information that has value in itself forecloses competition to a far greater extent than recognizing rights in information that merely facilitates transactions in other things. This is because the latter type of information can usually be conveyed via a variety of means, but information that has value in itself is unlikely to have equally satisfactory substitutes. Thus, the question whether an intellectual property claimant or its adversary is selling information, or is instead using information to sell something else, has tremendous implications for the allocation of value in markets where those parties operate. Answering this question thus ought to be a threshold step in intellectual property disputes at the boundaries of multiple regimes.

This article will survey the various doctrines within intellectual property law that implicate the distinction between information that sells and information that is sold, and suggest opportunities for refinement. In particular, while courts often treat cases at the boundaries of intellectual property regimes as all-or-nothing questions as to the existence of a right in the plaintiff, recognizing the distinction I have proposed suggests opportunities for less absolutist resolutions of competing claims. This is particularly true in hybrid cases where the subject matter in dispute has value both as information in itself and as a vehicle for information about some other good or service, or where the subject matter of exchange bundles independently valuable information together with some other good or service. In such cases, innovative doctrinal approaches including limitations on the scope of otherwise valid intellectual property rights, tailored remedies, burden-shifting regimes, and defenses may be appropriate means of reinforcing the boundaries between intellectual property regimes so as to promote salutary competition *both* in markets for information *and* in markets for other goods and services.