Managing Uncertainty in Intellectual Property Law

Neel U. Sukhatme

Abstract

In many ways, intellectual property is largely about managing uncertainty. Unlike traditional property, in which boundaries are clearly delineated and rights can be tangibly marked, the boundaries in intellectual property are, by their very nature, uncertain. IP law is an attempt to create man-made boundaries between intangible concepts, whether to incentivize innovation using patents, reward creativity through copyrights, or encourage investment in a brand by trademark protection.

But while IP law manages uncertainty, it does not eliminate it. This is partly because some uncertainty cannot be eliminated. Words sometimes cannot capture what an inventor has actually created, for example. Other forms of uncertainty, however, are reducible. Yet IP law does not reduce uncertainty to its limit. Indeed, in many circumstances, IP law deliberately maintains some level of uncertainty when defining or interpreting property rights.

This Article explores why this is the case. In particular, it explores how legal uncertainty can be used as a form of regulatory control. By not making the legal boundaries between intellectual concepts as sharp as they could be, IP law allows some form of reducible uncertainty to persist.

This use of legal uncertainty as regulatory control has a number of consequences. First, it defers decisions on legal claims to the future. Allowing or even fostering uncertainty in the law allows more of a “know-it-when-I-see-it” approach to legal interpretation—judges can adjudicate legal rights in the context in which they arise in a particular case. In the lexicon of law and economics, uncertainty transforms legal rules into legal standards, allowing greater flexibility for ex-post determination by judges and other adjudicators. In areas where we feel adjudication should be context-specific, uncertainty can be a helpful tool that implicitly delegates legal authority to a future adjudicator.

Second, uncertain as compared to certain boundaries can chill the behavior of risk-averse actors. This may or may not be socially beneficial, depending on the context. In particular, if a regulation is intended to promote the creation of a social good, legal uncertainty will likely decrease production of this good. If a regulation is intended to prevent a social harm, however, uncertainty in the regulation might actually deter behavior more than a certain one. In other words, leaving some level of ambiguity on a regulation might actually be more effective than making everything crystal clear.

The Article explores how these general principles are especially salient in the context of intellectual property. In particular, the Article examines the doctrine of equivalents in patent law and the fair use doctrine in copyright law as examples of maintained uncertainty in IP law. The Article also discusses how the legal uncertainty injected by these doctrines helps promote the rationales underlying intellectual property.

1 Ph.D. Candidate (Economics), Princeton University; J.D., Harvard Law School. The author would like to thank participants at the 2013 Yale Law School Doctoral Scholarship Conference for their helpful comments and insights. All errors are the author’s own.