

How to research an IP “story”

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The primary student work product for the Foundations of Intellectual Property Law seminar is a research paper that investigates and describes the historical origins of and the contemporary significance of a single leading, older case in intellectual property law, in the style (more or less) of the scholarship collected in the two texts that have been used for the course: *Intellectual Property Stories* (Jane Ginsburg and Rochelle Dreyfuss eds. 2005) and *Intellectual Property at the Edge: The Contested Contours of IP* (Rochelle Dreyfuss and Jane Ginsburg eds 2014).

The format and style of the final papers may vary considerably; the chapters in these two books illustrate some of the possible breadth, and students should read the texts carefully and take away guidance regarding how they might approach writing their own papers.

Researching these papers may be a challenge, because while much of the research that goes into these papers is “legal” research of a sort, not all of it is “legal” research of the sort that law students are ordinarily trained to conduct. Students in this seminar are expected to go beyond primary legal sources (cases, statutes, administrative materials) and beyond “ordinary” secondary legal sources (treatises, law journal articles). This memo is intended to help students do that extra work, and to optimize their research and results.

The following may be used as an initial checklist, but it should not be used mechanically. Research strategies need to be “agile,” to borrow a current management word. The questions that any researcher (student) must bear in mind are these: what am I trying to learn? How am I going to learn that?

1. *The case itself. As to the case itself, you want to know:*

Who were the parties? Were they individuals or organizations? What were their histories – where were they born or created, how did they grow up/develop and perhaps change over time? Who were their leaders and/or decisionmakers?

Why were they fighting? One or more of the parties had a problem to which this litigation was all or part of a possible solution. What was the problem (business problem? Cultural problem? Legal problem? Personal problem? Some combination?)? How was the litigation going to solve it? And did anticipated solution actually solve the problem?

Who were the lawyers? What were the lawyers’ backgrounds, experiences, and talents (and weaknesses)?

Who were the judges (with most appellate cases, one would expect to find a trial judge – and perhaps more than one, depending on the procedure – and appellate judges, and perhaps Supreme Court justices? What were their backgrounds, experiences, and talents (and weaknesses)?

Much of this information is available in the reported opinions, although one may have to look in biographical sources and organizational histories. Organizational histories of corporations and other entities are often available in business libraries. Judicial biographies

were relatively easy to come by. Biographical information about lawyers, law firms, and law practices may be less common.

Tip 1: to find relevant sources, start by searching in legal journals for articles that contain extended discussion or analyses of the case that you are focused on. Those articles are likely to be useful in themselves, but they are also likely to be useful in that they may offer useful pathways to additional sources. Read the footnotes!

Tip 2: make sure that you exhaust all available sources to get the complete record of the case that you are researching, in all courts, from the trial court through final appeal. You want to see all available pleadings, briefs, and court orders and judgments.

2. *Markets and industries. As to the players, you want to know:*

How were the parties' conflicts and motivations shaped by their incentives and rewards in the broader business, government, or non-profit worlds, and by incentives and rewards available to their competitors and peers? This is a first cut at "context." A patent case concerning a chemical compound would be situated in the chemicals industry of the relevant era. A copyright case about a commercial film would be situated in Hollywood of that time. Business goals, interests, and strategies may be at stake. Technologies may affect what businesses can and cannot do. Consumers, audiences, and commercial rivalries may shape markets.

Much of this information is available in books rather than in journal articles, and the relevant books are likely to be based in disciplines other than law: business and management; history (including art history, business history, science and technology history, and cultural history); one or more technological fields, and so on.

Tip 3: Google Books and Google Scholar can be invaluable tools for identifying books of potential value. Be expansive and imaginative with search strategies; do not search only for material about your case. If you find material in Google that gives you "snippets" but not full text, be sure to search for the same material in the University of Pittsburgh Library System catalog. Often, Pitt has access for full-text digital copies.

Tip 4: search "forward" as well as "backward." "Backward" searching means checking footnotes and reference lists to see what information the author relied on; you may track down those same sources and see if they have additional information of value to you. "Forward" searching means taking the citation to the work that you find useful and putting that citation itself into one or more search engines (Westlaw or Lexis/Nexis and/or Google Books and Google Scholar), in order to find more recent scholarship that might bear on your question.

3. *Social, political, and cultural conditions. As to the conflict between the parties, you want to know:*

What attitudes and influences circulating in public and private networks at the relevant time(s) affected how the case was framed, litigated, and analyzed? If category 2 relies heavily on

“business history” and economics, this category 3 relies heavily on “cultural studies.” For obvious reasons, this material can be difficult to nail down; this is usually *interpretive* rather than quantitative. But cultural studies scholarship offers a rich vein of information, especially for cases in copyright and trademark. For trademark cases, look at histories of advertising and marketing, both generally and as to the classes of products or services at issue. For copyright cases, look at histories of relevant forms of art, creativity, and culture.

Tip 5: as above, Google Books and Google Scholar are the best places to begin.

4. *What happened next? You want to know:*

What happened *after* the case was decided? Did the law change in durable ways, or did the pendulum swing back in the other direction, judicially or legislatively? In either event, why? Focus both on the *micro* level (these parties, these lawyers, these judges) and also on *macro* levels (this industry, this technology, this community of people – or more than one of each). Did the conditions that prompted the lawsuit change or remain the same? Did the usual pattern of litigating conflicts like these change or remain the same? And in what respects – if any – can you say that this particular case had a material impact on any of those changes?

Tip 6: cause and effect is a difficult game to play, so don't be tempted to over-claim. Use the same techniques described above to bring the older case into the present day. Look at recent cases to see how modern courts describe and use older law. Look at modern industry, technology, and social and cultural life to see whether the patterns that motivated the original lawsuit have changed or remained the same.

Tip 7: here, and perhaps only here, online-only sources may be useful guides. On the whole, you should expect your historical research to focus primarily on historical sources – material that was published print first and that may be in digital form today – but may not.