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# The Peach and the Fuzz

Navigating the tortuous path of intellectual property rights.

**E**ven the smartest business people can be confounded by the ownership rules governing intellectual property, IP, in the United States. And with good reason: the controlling statutes give courts wide discretion to interpret the legal principles at play. To begin to understand how these principles might apply to you and your company, here are a few fundamental tenets and rules of thumb to kick-start your thinking.

Most of us understand that something new and original may be the subject of IP protection. An invention, such as a new way of sending e-mail, can be the subject of a patent, or an original song can be the subject of copyright. It is important to keep in mind that, under the U.S. Constitution, Congress is empowered “to promote the progress of science and useful arts by securing

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for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Federal and state laws protecting IP such as patent, copyright and even trademarks, can also be viewed as carve-outs against the First Amendment, which prohibits Congress from enacting laws that, among other things, abridge the freedom of speech or the press.

One general rule of thumb is that certain intellectual property laws tend to favor the individual creator, inventor or author. A good example is the law governing “works made for hire” under United States copyright law. If your company hires an independent contractor to write custom source code and you pay the contractor in full for her work, your company *does not own* the copyright in that code unless you have a written agreement stating that the work performed by the contractor was a “work made for hire” or, alternatively, that the contractor assigns to your company all her right, title and interest in the source code.

Consider the following allegorical framework next time you are forced to ponder vexing IP ownership questions. Let’s assume certain science or technology exists that contains protected IP,

such as a genetically engineered organism, source code or a musical composition. We will call this original discovery or underlying work the “Peach.” Let’s further assume employees or contractors working for your company have begun to adapt and improve upon the Peach. We will call these adaptations and improvements the “Fuzz.”

Difficult questions arise when attempting to determine the size of the Peach and who owns all or portions of it. Ideally, you also would like to know where the Peach ends and the Fuzz begins. Certainly, there are many product and technology development scenarios where the Fuzz itself becomes so pervasive and large, it overwhelms the Peach. At this point (early on, one hopes) in the analysis, you not only need to be clear on your company’s business and investment objectives and strategies, but also you need to have a strategic handle on the pertinent IP legal issues as well.

The federal district court in New York is currently grappling with these types of IP ownership and use issues in the case of *Viacom Int’l Inc. v. YouTube*. One of the big questions in the case is whether YouTube may be liable for allowing the posting of allegedly protected audio and video content.

Intuitively, we recognize that art and inventions that benefit society must rely to some degree on the art and inventions that have come before them. We also recognize that inventors and artists (and the companies representing them) need to protect and commercially benefit from the IP they create. The most troubling questions turn on whether or when we allow new inventors and new artists to incorporate past-protected IP without permission versus when we require they obtain (and pay for) permission. You only have to view and listen to something like “The Grey Album” by DJ Danger Mouse (a mash-up from five years ago that used unauthorized Beatles and Jay-Z samples and became a bootleg internet phenomenon) to recognize that the balancing act is a tenuous and difficult one.

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