

Making Sense of Intellectual Property

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In recent years, intellectual property (IP) scholars have struggled to explain the boundaries of and differences between copyright and patent law. This Article proposes a novel explanation: copyright and patent can be fruitfully understood as establishing a dichotomy between the different human senses. Copyright traditionally involves objects addressed to the senses of sight and hearing, while products appealing to touch, taste, and smell are the province of utility patent law. The Article begins by establishing this descriptive proposition, and it shows how some of the most contested areas of IP (*e.g.*, the useful articles doctrine in copyright law and design patents) involve breaches of this sensory dichotomy. Next, I argue that the sensory dichotomy in IP reflects the sensory hierarchy in traditional Western aesthetic theory. According to this tradition, sight and hearing are considered “high” senses capable of unconstrained aesthetic and cultural experiences. Touch, taste, and smell, by contrast, are considered “low” senses, because their connection to natural bodily needs constrains their aesthetic capacities. IP law’s treatment of the senses in copyright and patent law matches this hierarchy.

Recently, however, fundamental principles of Western aesthetic theory have been undermined by developments in cognitive neuroscience, evolutionary aesthetics, and haptic and culinary communication. This research suggests that sight and hearing are not as aesthetically unconstrained and functionless, nor are touch, taste, and smell as aesthetically constrained and functional as previously believed. Accordingly, I argue that IP law should treat appeals to the senses uniformly. Works that express or communicate ideas, emotions, or pleasures to any of the five senses in a way that creates original works of authorship should be potentially copyrightable. The Article concludes with an analysis of this proposal’s effects on various creative fields, including tactile objects, fashion, culinary dishes, and yoga.