Focus on Faculty - Rebecca S. Eisenberg

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AS A TEENAGER, I HAD A PASSION for studying foreign languages. I loved immersing myself in an unfamiliar idiom, struggling to make sense of another system for parsing words and sentences to describe experiences and observations. I reveled in subtle differences in the meaning of words that were sometimes, but not always, equivalents in translation. Most intriguing of all were the occasional insights I gained into the limitations of my own language when I recognized that a foreign locution simply has no English equivalent.

I gave up the study of foreign languages at some point in college, or so I thought. But as I reflect upon what I'm doing in mid-career, I wonder if I've become a lifelong exchange student of sorts, continually struggling to make sense of a foreign idiom, and always trying to figure out what is getting lost in the translation.

I am trained as a lawyer and have been teaching intellectual property to law students since 1984. Although I think I carry out this job in plain English, other observers might report that I speak some sort of "IP" dialect of legalese. But my research continually takes me outside the community of lawyers and future lawyers to attempt conversation with people who work in a very different idiom. I study how intellectual property operates in the setting of biomedical research, and that task brings me into communities of research scientists on a regular basis. Sometimes my formal role is more or less that of a guest lecturer or author, trying, without benefit of a translator, to make patent law concepts comprehensible to people who don't know my dialect. But once my own presentation is finished, I revert to the role of exchange student, listening or reading along while scientists talk to each other in a language that makes a little more sense to me each time I hear it.

What fascinates me in both of these roles — presenter and observer — is not simply trying to follow the scientific jargon, nor even the far greater challenge of following the science that the jargon describes, but rather the challenge of recognizing the similarities and differences in the categories and concepts that are salient in the discourses of intellectual property and research science. Why is it, for example, that a publication announcing the identification and characterization of a new gene may list fifty authors, while the patent application on the same gene will list only two or three inventors? How is authorship on a scientific publication like or unlike inventorship on a patent application? And what are the implications of these similarities and differences for patent controversies within the
scientific community? Patent law repeatedly invokes the judgment of a fictitious practitioner of ordinary skill in the field of the invention in setting legal standards, but is it framing questions that such a practitioner would find meaningful and appropriate, and is it correctly understanding the answers? To some extent, differences in the vernaculars of law and science correspond to cultural differences between industry and the academy in biomedical research. Much of my work focuses on the role of intellectual property at the public-private divide in research science. Recently I served as chair of a working group on research tools for the National Institutes of Health. In that capacity, I spent many hours talking to people in universities and private firms about difficulties they encounter in negotiating mutually agreeable terms of exchange for research tools — materials, information, and reagents — for use in biomedical research. Just about everyone agrees that there is a growing problem, but they tell different stories about what the problem is. Those who administer the patent system often take it for granted that owners of inventions will be adequately motivated to transfer proprietary technology to potential users if the stakes are high enough, yet in this particular setting, the costs of bargaining seem to be consuming the gains from exchange. Why are exchange mechanisms that have worked tolerably well in other fields less successful in the market for biomedical research tools?

When I left practice for teaching, I worried that after a few years I would be bored in the Ivory Tower, too far removed from emerging problems in the real world. In practice, I was constantly presented with new problems, and my challenge was to describe the issues in a way that made the resolution favored by my client seem like the most modest, unexceptionable increment over prior resolutions of similar problems that had long been settled. In the academy, I feared that I would never see a new problem, that I would instead be doomed to rehashing old issues, and my challenge would be to repackage old ideas in a way that seemed new and unprecedented.

Instead, to my great delight, the field I observe is constantly presenting new problems, shifting in ways that turn my questions around and reveal new angles I hadn’t thought of. My telephone keeps ringing, although I have no clients to control how I spin an issue. My greatest challenge is to be sure I understand all that I’ve heard before I speak, and to be sure that my own words are not misunderstood.