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 rehearsing old issues, and my challenge would be
to repackaging 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.