

Property

- Module 2
- Subject Matter

How to think about Subject Matter; Cohen

- Is the label “property” a premise or a conclusion?
- Cohen
 - Language of economics or social policy:
 - \uparrow TM \rightarrow \uparrow monopolies \rightarrow \uparrow social utility
 - Language of property
 - Creating a \uparrow TM is of value, things of value need property to help protect them
- Creation of property as “inherent” in a resource by courts responding to investment to create value
 - or . . .
- Evaluation of the pros/cons of property in a particular resource

Hinman v. Pacific Air Transport (9th Cir. 1936)

- Assertion of rights in airspace above land
- “. . . the space claimed must have some use, either present or contemplated, and connected with the enjoyment of the land itself.”
- Emphasis on the need for actual use of the airspace to perfect title in it
- No injunctive relief
- No use of the airspace above the land
- No actual interference or damage



The Amistad (1841)

- slavery – legal in Cuba
- slave importation – illegal under the laws of Spain
- Spanish subjects and “proprietors” – Ruiz and Montez
 - What alleged property interest do they assert?
 - “pretended purchase”

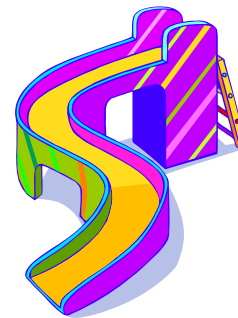
Moore v. Regents of Cal. (Cal. 1990)



- If there is not conversion liability in the law, should it be extended?
 - Policy – patients have protection, concern with a strict liability tort's effect on third parties and research generally
 - Better to let legislature act
 - Don't need it to protect patient's rights
- Dissent – Mosk, J.
 - Property is an abstract concept that fits differently to the different types of objects to which it attaches
 - Mining and harvesting from this collected tissue is itself a moral concern of using the body
 - Unjust enrichment and unequal bargaining positions
 - Informed consent protection is less – negligence based

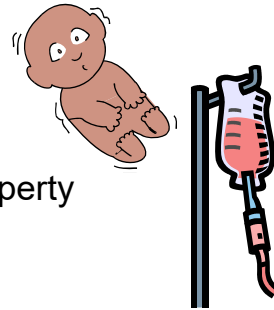
Moore v. Regents – further development

- Property and modifying the bundle of rights
 - Market-inalienable
 - Only market-inalienable
 - Partial market-inalienability
- Pro and Con of market-inalienable rules for transplant organs



Radin: Market-Inalienability

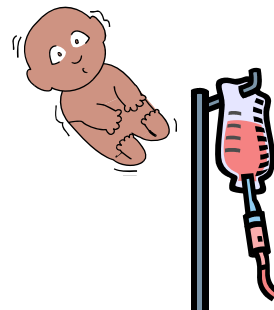
- What does inalienable mean?
- How to evaluate when to designate a property entitlement as market-inalienable?
 - commodification



- Rhetoric of anti-commodification and of commodification

Radin: Market-Inalienability

- Dangers of Rhetoric of commodification?
 - Risk of error
 - Injury to Personhood
- Counter-points?
 - Mutual gain via exchange
 - How to decide in which domains market rhetoric is inappropriate?
 - Is property rhetoric the same as commodification rhetoric?
 - Gift economies?



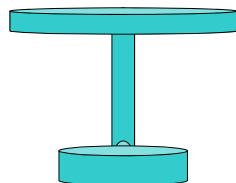
Kremen v. Cohen (9th 2003)

- Kremen obtains domain name: sex.com
 - From Network Solutions
 - At the time the events, 1994, Network Solutions was the primary company registering domain names
- Cohen forged a letter to trick Network Solutions to transfer the domain name to him
- Kremen wins a judgment, but unable to collect . . .
- Four counts against Network Solutions
 - conversion
- Three part test as to whether there is a property right
 - Domain names are property
 - Should intangible nature eliminate conversion?
- Common law versus restatement rule (merged into a document) and meandering California case law

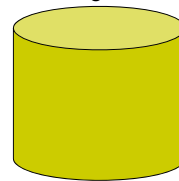
IP Vignette



Competing Product



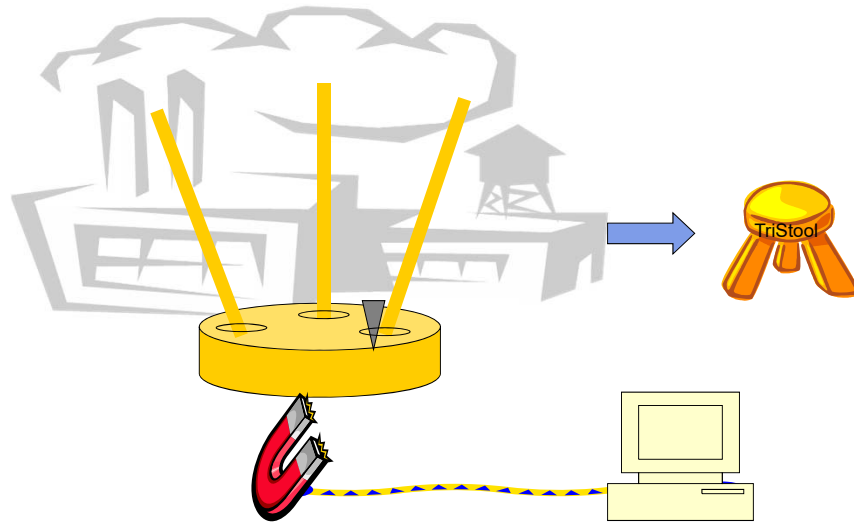
Existing Product



New Product



Trade Secret



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Patent – claims

Narrow ←————→ Broad

1. A **seating apparatus**, comprising:
 - (a) a horizontal **seat**, and
 - (b) three **legs** each having one end connected to the **bottom** of said horizontal **seat**.

1. A device for supporting objects, comprising:
 - (a) a horizontal support member; and
 - (b) three vertical support members each having one end connected to the same face of said horizontal support member.

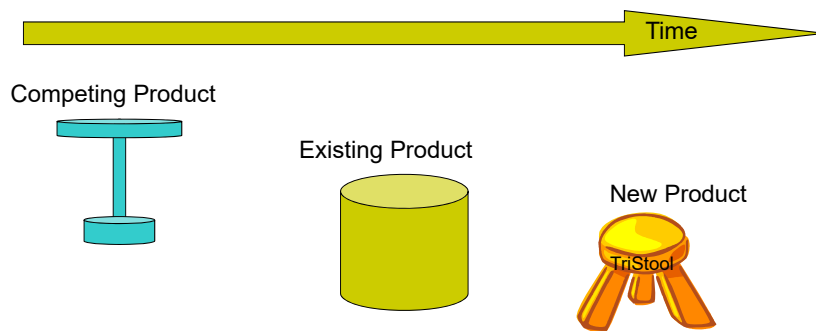
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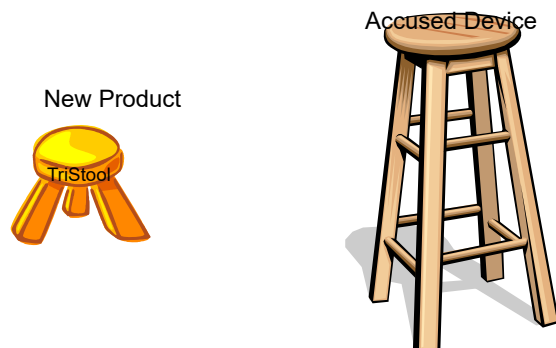
Patent - patentability

- patentable subject matter
- **novelty; utility; non-obviousness**
- specification support

- novelty:



Patent - infringement

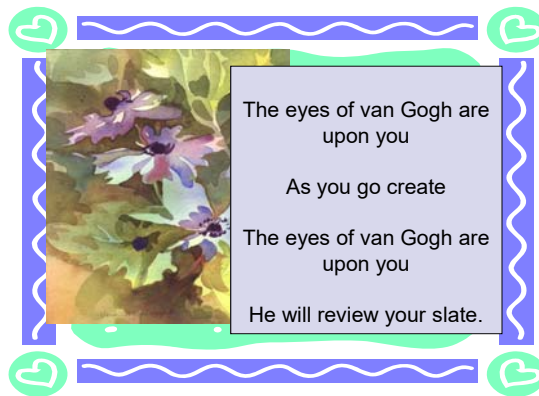


Copyright

The Eyes of Marshall are upon you
As you legislate.
The eyes of Marshall are upon you
He will review your slate.
Do not think you can escape him
Your law must pass his way
As keeper of the constitution
The Court will have its say!



Copyright



Trademark

Generic	Descriptive	Suggestive	Arbitrary / Fanciful
Stool	Sitting Stool Super Stool Sturdy Stool	TriStool	3LS Tiger Claw

Prior Rights?

- TriStool for plant pruning equipment?
- TriStool for toilets?
- TriStool for shaving razors?
- TriStool for 4 legged chairs with backs?

Infringing?

- TryStool** for stools?
- www.tristool.com?
- TripleStool?

Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000)

- Isley Brothers' "Love is a Wonderful Thing"
- Bolton's "Love is a Wonderful Thing"
- Ownership
- Infringement:
 - Copying: access plus substantial similarity (intrinsic/extrinsic)
 - Improper Appropriation

Indeed, this is a more attenuated case of reasonable access and subconscious copying than *ABKCO [Harrison]*. In this case, the appellants never admitted hearing the Isley Brothers' "Love is a Wonderful Thing." That song never topped the Billboard charts or even made the top 100 for a single week. The song was not released on an album or compact disc until 1991, a year after Bolton and Goldmark wrote their song.

