

Mentor Factors in Intellectual Property

Dennis Crouch

University of Missouri School of Law

This article introduces the concept of "Mentor Factors"—a set of objective indicia that have significant cross-cutting applications throughout intellectual property jurisprudence. Named after the trusted advisor in Homer's *Odyssey* who provided external guidance (occasionally via Athena), these factors represent marketplace validation that transcends subjective technical assessment.

Mentor Factors are perhaps most well-known in patent law's obviousness analysis, where factors such as commercial success, long-felt need, unexpected results, industry recognition, and licensing history have been given the somewhat-derogatory name of "secondary conditions" that are often disregarded for failing a tight nexus requirement. But, many of these same evidentiary elements play important roles across IP regimes, such as in establishing acquired distinctiveness in trademark law, informing fair use analysis in copyright, demonstrating economic value in trade secret litigation, and determining appropriate remedies across all IP domains.

By mapping these factors across different IP regimes, the paper reveals their consistent function: providing empirical, market-based evidence of legal significance beyond the technical merits of the intellectual property itself. For example, commercial success demonstrates acquired distinctiveness in trademark law just as it supports non-obviousness in patents, while copying by others provides evidence of both copyright infringement and trade secret misappropriation. Despite this functional consistency, IP regimes diverge significantly in their approaches to these factors—applying different standards of proof, nexus requirements, procedural burdens, and evidentiary weight—creating unnecessary doctrinal fragmentation.

The paper advances IP scholarship by proposing a more unified framework for market-based validation across disparate doctrines. Although Homer's Mentor was not infallible, he nonetheless offered vital wisdom that may have been otherwise invisible. The integration of Mentor Factors here suggests a new frame for understanding these external validation criteria and represent a fundamental theory underpinning intellectual property protection—that market response often provides the most reliable evidence of worth.