

Hyperreal: IP Law and the Visual

Amy Landers

Fundamentally, law is a text-based medium. Yet law is surrounded, informed, and embedded in visual cultures, in which understandings are developed and exchanged. In the intellectual property context, the existence (or non-existence) of legal rights is closely aligned with visual representations. This occurs in at least the following instances: 1) the scope of rights for design patents; 2) visual works subject to copyright protection (such as photographs and film); 3) trade dress protection, including product design and packaging; and 4) logos in the trademark context. Other examples exist, such as drawings that inform the construction of patent claims.

The date, the law has not developed committed interpretative theories about the interpretation of visual media akin to those available for text. An incalculable amount of interpretative guidance has been generated to consider ways to deriving meaning from words and their relation to each other, particularly in the field of constitutional and statutory interpretation. In that context, the literature has considered modernist, post-modernist, legal realist and other interpretative constructs. No similar comprehensive theories have been developed for the legal interpretation of visual media.

For photographic images, the law view these primarily through a modernist lens, as a mix of objective and subjective elements. Where law's truth-seeking purpose is paramount, such as in the criminal justice system, this construct suggests that access to objective truth might be obtainable if subjective layers of meaning could be excised. For areas of the law that encourage creativity such as copyright, the doctrinal standards emphasize the search for subjective elements that evidence an author's vision. Some legal scholars have critiqued the use of photographs as an uncertain medium incapable of informing the existence of legal rights. Echoing postmodern thinking, such sources point out the interpretative uncertainties inherent in visual media.

These critiques, while salient, do not appear to have evolved into developed theories or resolution. This work seeks to further these conversations, particularly as society has become pluralistic and besieged by the challenges of a post-truth era.