Whose idea is it anyway?

New faculty ponder complex intellectual property issues

In this high-technology era, intellectual property is fast becoming a high-interest legal topic. But like current copyright laws and patent casebooks, law school curricula have lagged behind in their treatment of bits, bytes, and chips and their real-world (pardon the pun) RAMifications.

Things are changing, though, at least at Michigan. This fall, the Law School hired two new faculty members, Rebecca S. Eisenberg and Jessica D. Litman, who specialize in intellectual property. Student interest in their specialties runs high: Their winter-term courses in copyright, protection of technology, and legal issues in scientific research filled up faster than a blank minidisk. Eisenberg and Litman plan to team-teach a fall-semester survey course in intellectual property and are devising a four-course sequence that will do justice to this burgeoning area of law and expanding legal employment.

Eisenberg is a graduate of Stanford University, which awarded her the B.A. in economics, and of the University of California at Berkeley School of Law, where she was associate editor and articles editor of the California Law Review. After receiving her J.D. in 1979, she was clerk to the Honorable Robert F. Peckham, Chief Judge of the United States District Court for the Northern District of California. She then practiced with the San Francisco law firms of Heller, Ehrman, White & McAuliffe and Petty, Andrews, Tufts & Jackson.

Eisenberg’s principal areas of interest within intellectual property are the protection of technology, trade secrets, and the copyright protection of computer software, areas in which she specialized during her four years in practice. During those years, other types of commercial litigation were also within her purview. “In practice,” she notes, “you don’t set your own agenda. You can’t ask a client’s employees to leave and form a new company using the firm’s trade secrets!”

The ability to set her own agenda and to study intellectual property issues in depth, without the pressures and time constraints inherent in practice, were the chief factors motivating Eisenberg’s return to academia. She also allows that universities seem like home to her. She recalls how her post-college desire to “be out in the real world” gave way, after one year as an economist and investment counselor, to a desire to return to school. Once back there, she was that rarity: a law student who actually enjoyed the first year. Fascinating clients and issues made real-world practice exciting and satisfying the second time around. “But when I reached the point when I had to choose my path,” Eisenberg explains, “I thought I’d give academics a try.”

So far, she has not been sorry. “I can’t think of anything I could do to earn a living that I’d enjoy more than teaching,” she says. She finds particular satisfaction in giving students the tools necessary for tackling high-technology legal issues. Although technology is an important industrial asset, Eisenberg notes that high-tech law is still an underconcep-
technology, computer skills are not necessary to such lawyering. "You learn technology as needed for a specific problem," Eisenberg says. "But with clients in this area, you have to push to get an understanding that you know enough to make a decision. And clients often have a moral notion of the rights and wrongs of a case that doesn't necessarily coincide with what the law says. Legal rights have become more important quite suddenly in this area. Maybe in time clients will internalize legal rules, and their sense of right and wrong will coincide more with the way the law operates. And the law may change, too, to conform to their notions. The disparity is bigger now than it will be in the future, I suspect."

Jessica D. Litman is a 1983 graduate of the Columbia University Law School, where she served as notes and comments editor of the Columbia Law Review. After receiving her J.D., she clerked for the Honorable Betty B. Fletcher of the United States Court of Appeals for the Ninth Circuit. She holds an undergraduate degree in theatre from Reed College and an M.F.A. degree in directing from Southern Methodist University.

Unlike Eisenberg, whose intellectual property interests relate to her contact with high-technology clients, Litman acquired her taste for the area through years in the theatre. (The theatre—or rather, the paralegal jobs she held off-season—is also the source of her interest in mental health law.) As a former theatre director, stage manager, and occasional playwright, Litman brings a unique perspective to questions of copyright as they relate to artistic creation.

As for Eisenberg, law is a second career for Litman. "When I started directing," Litman explains, "I decided that if I was self-supporting and successful by a certain age, I would keep it up. Well, I reached that age, and I had a stable job, I was making a living and doing work that I found satisfying. I didn't have to leave directing. But I began to question whether it was really what I wanted to do. Over the years, a number of young people had come to me and asked advice about going into the theatre. I always said, 'Don't do it if there's anything else that would make you happy.' I decided to take my own advice."

The variety of legal career paths offering the autonomy and intellectual challenges of the theatre—without its tremendous highs and lows—persuaded Litman that law school was the ticket to change. Her interest in copyright began as a practical matter: Shortly before she enrolled at Columbia Law School, she became embroiled in a copyright dispute with a theatre company for which she had worked. "Here I was," she recalls, "an impecunious student who didn't know any approachable lawyers in the copyright area. I learned a great deal of copyright law to deal with the problem—and ultimately prevailed. In the process, I discovered that the whole legal area was absolutely fascinating."

Later, as a second-year law student, Litman read virtually the entire 26-year history of the Trademark Act in connection with a law review note she was writing. The result was a solid foundation in a closely allied legal area.

The advent of photocopying, disk copiers, printers, and cable and satellite technology have created questions of ownership of rights, copyright infringement, and fair use never contemplated by statute makers. "Technological developments," Litman notes, "have made many statutes obsolete even before their enactment. One is constantly dealing with omitted cases."