

Raw Materials in Intellectual Property
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This paper analyzes the deployment of a “raw material” metaphor to cabin in the scope of rights across intellectual property regimes. IP laws frequently distinguish between authorship/invention and their “raw materials” in order to ensure that a single actor does not preempt wide swaths of socially valuable activity. In copyright, a robust public domain is meant to provide the “raw material that makes authorship possible,” and the fair use doctrine prohibits liability if a copyrighted work “is used as raw material” for “new aesthetics, new insights and understandings.” Right of publicity law similarly immunizes the use of celebrity likeness if it is one of “the raw materials from which an original work is synthesized.” Trademark law protects the use of trademarked words in their ordinary, descriptive sense because words are the “raw material” for commercial publishing. Patent law requires a claimed invention to be distinct in some meaningful way from its raw materials because abstract ideas, natural phenomena and products of nature are “the basic tools of scientific and technological work.”

Although the preemptive potential of IP rights is undoubtedly an important concern, the selective deployment of the raw material rhetoric nonetheless reinforces hierarchies among different forms of creative or inventive activities and discounts the considerable human labor that goes into the production of purportedly “raw” materials. On one hand, the raw material rhetoric can produce considerable unfairness. Compiling large amounts of factual information or isolating a DNA sequence can require substantial time, skill and money, yet they are *categorically* excluded from IP protection. On the other hand, the raw material rhetoric is seriously under-inclusive. Our cultural interactions depend not just on the naturally occurring, pre-social aspects of our social environment, but just as much on “cooked” cutting edge technological platforms, mass culture, well-known brands, and celebrity personae. IP rights nonetheless routinely encumber these materials and, as a result, a wide range of culturally and commercially valuable activities.