Left Brain vs. Right Brain:
Conflicting Conceptions of Creativity in Intellectual Property Law

Gregory N. Mandel
Temple University—Beasley School of Law

American intellectual property law treats the rights of joint inventors to patents and of joint authors to copyrights very differently. Copyright law provides that individuals can only be joint authors if each intended to be a co-author and each made an independently copyrightable contribution to the copyrightable work. Patent law is more lenient in this regard: individuals can be joint inventors regardless of intent, even if their contributions were not independently patentable, and even where one inventor only contributed to a subset of the patent claims. This divergence results more from historically independent doctrinal development rather than intentional differentiation based on differences in the underlying subject matters. Foreign jurisdictions apply different substantive law concerning the requirements and rights of joint authors and inventors, and sometimes do not reveal as significant a divide as in the United States.

At the heart of the disparate treatment of joint authors and inventors lie differing social attitudes towards the creativity of authors versus inventors, perceived differences in their creative processes, and differing opinions concerning the natural rights of authors versus inventors in their labor and creations. These differences are rooted in conflicting conceptions of creativity between authors and inventors. Authorship is perceived and governed as traditionally right brain mode of thinking, inventorship as left brain. This conception helps explain why other countries continue to apply different rules, even in an era of international harmonization of intellectual property law. Eastern cultures' conceptions of creativity often differ from western cultures', focusing, for example, more on the integration of collective inputs from many rather than romantic notions of iconic individual creators.

In reality, the common dichotomy between modes of creativity for authors and inventors—in both perception and intellectual property law—is substantially exaggerated. As a consequence of this bias, however, intellectual property law likely does not appropriately incentivize and reward certain creative work, and in particular may fail to adequately incentivize collaborative endeavors and extraordinary innovation.