



6th Annual Texas A&M Intellectual Property Scholars Roundtable

FINAL PROGRAM

FRIDAY, NOVEMBER 11, 2022

8:30 **Breakfast**

9:00 **Welcoming Remarks**

Prof. Peter K. Yu, Director, Center for Law and Intellectual Property, Texas A&M University School of Law

9:15 **Panel 1: Copyright Law**

Moderator: Prof. Marshall Leaffer, Indiana University Maurer School of Law

Presenters: Prof. Derek Bambauer, James E. Rogers College of Law, University of Arizona
“Anti-Moral Rights”

Prof. Timothy J. McFarlin, Cumberland School of Law, Samford University
“A Copyright Restored: Mark Twain, Mary Ann Cord, and How to Right a Longstanding Wrong”

10:45 **Coffee Break**

11:00 **Panel 2: Intellectual Property and Institutions**

Moderator: Prof. H. Brian Holland, Texas A&M University School of Law

Presenters: Prof. Timothy T. Hsieh, Oklahoma City University School of Law
“A Comprehensive Proposal for a Unified Federal Patent District Court”

Prof. Daryl Lim, Penn State Dickinson Law
“Adaptation”

Prof. S. Sean Tu, West Virginia University College of Law
“The Long CON: An Empirical Analysis of Pharmaceutical Patent Thickets”

Prof. Saurabh Vishnubhakat, Benjamin N. Cardozo School of Law, Yeshiva University
“The Coming Copyright Judge Crisis” (with David Fagundes)

1:00 Lunch

2:00 Panel 3: Trademark Law

Moderator: Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law

Presenters: Prof. Andrew C. Michaels, University of Houston Law Center
“Appropriation Art and Free Expression in Trademarked NFTs”

Prof. Sandra L. Rierson, California Western School of Law (Spring 2023)
“Trademark Law and the Creep of Legal Formalism”

3:30 Coffee Break

3:45 Panel 4: Technology Law

Moderator: Prof. John T. Cross, University of Louisville School of Law

Presenters: Prof. Hannah Bloch-Wehba, Texas A&M University School of Law
“A Public Technology Option”

Prof. Nikola Datzov, University of North Dakota School of Law
“Find Me If You Can—An Overlooked Roadblock to IP Enforcement in Web3 Technologies”

Prof. Amanda Reid, UNC School of Media and Journalism
“Analyzing Big Tech Transparency Reports”

5:30 Roundtable Adjourns for the Day

7:00 Dinner for Roundtable Participants

Waters
301 Main Street, Fort Worth

SATURDAY, NOVEMBER 12, 2022

8:30 Breakfast

9:00 Welcoming Remarks

Dean Robert B. Ahdieh, Anthony G. Buzbee Endowed Dean's Chair, Texas A&M University School of Law and Vice President for Professional Schools and Programs, Texas A&M University

9:15 Panel 5: Copyright Law

Moderator: Prof. Llewellyn J. Gibbons, University of Toledo College of Law

Presenters: Prof. Oren Bracha, University of Texas School of Law
"Copyright's Atom: The Expressive Work as the Basic Unit of Analysis" (with Talha Syed)

Prof. Aman K. Gebru, University of Houston Law Center
"Scaling Authorship"

Prof. Ned Snow, University of South Carolina School of Law
"Copyright, Commerce, and Knowledge"

11:00 Coffee Break

11:15 Panel 5: Intellectual Property and Global Development

Moderator: Prof. Jeff W. Slattery, Texas A&M University School of Law

Presenters: Prof. Daniel Benoliel, University of Haifa Faculty of Law (Israel)
"IP amid Concentration and Inequality"

Prof. Doris E. Long, University of Illinois Chicago School of Law
"Combatting Climate Change: Hard Earned Lessons from the Health Wars"

Prof. Alina Ng Boyte, Mississippi College School of Law
"The Social Value of Intellectual Property"

1:00 Lunch

2:00 **Panel 7: General Intellectual Property Law**

Moderator: Prof. Lars S. Smith, University of Louisville School of Law

Presenters: Prof. Eric E. Johnson, University of Oklahoma College of Law
 “Seeking Sense in the Right of Publicity’s Three Faces”

 Prof. Stefania Fusco, Notre Dame Law School
 “Does the EU Market Need an *eBay*-like Case? Evidence Against Granting Automatic
 Injunctions in Europe” (with Valerio Sterzi)

 Prof. Peter K. Yu, Texas A&M University School of Law
 “War and IP”

3:45 **Closing Remarks**

 Prof. Peter K. Yu, Texas A&M University School of Law

7:00 **Dinner for Roundtable Participants**

 PalmWood, PalmWood Event Level, 640 Taylor Street, Fort Worth

Commentators

- Prof. John T. Cross, University of Louisville School of Law
- Prof. H. Brian Holland, Texas A&M University School of Law
- Prof. Llewellyn J. Gibbons, University of Toledo College of Law
- Prof. Marshall Leaffer, Indiana University Maurer School of Law
- Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law
- Prof. Srividhya Ragavan, Texas A&M University School of Law
- Prof. Jeff W. Slattery, Texas A&M University School of Law
- Prof. Lars S. Smith, University of Louisville School of Law
- Prof. Joy Xiang, Peking University School of Transnational Law (China)
- Prof. Peter K. Yu, Texas A&M University School of Law

ABSTRACTS

Prof. Derek Bambauer, James E. Rogers College of Law, University of Arizona
“Anti-Moral Rights”

In contrast to most other copyright systems, American law is disdainful of, if not outright hostile towards, moral rights concepts. Federal copyright complied late and grudgingly with its obligations under the Berne Convention via an awkward amalgamation of the Visual Artists Rights Act (passed in 1990) and a congeries of scattered provisions in the Copyright Act, Lanham Act, state law, and even local law. These protections are far more circumscribed than their European counterparts. Importantly, and unlike EU moral rights protections, American moral rights are generally waivable or alienable via private ordering through contract, which is in considerable tension with the theoretical underpinnings of these entitlements. The courts have interpreted VARA and its state law analogues narrowly, and the U.S. Supreme Court has weakened if not eliminated attribution rights after its decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*

There are different potential explanations for this reluctance to confer moral rights—a standard component of most copyright regimes—upon creators under American law. U.S. policymakers may simply operate from a different philosophical perspective and hence view moral rights as relatively unimportant if not irrelevant. They may be constrained by public choice considerations, where creators’ interests are subordinated to those of distributors and other intermediaries due to raw political or economic power. Or, as this Article argues, American copyright law has become blinkered by its focus on economic considerations such as incentive theory or transaction cost concerns. The Article supports this claim with several additional descriptive elements beyond the relative paucity of moral rights provisions. First, despite a rhetorical focus on creativity and originality, American copyright law discards authorial interests in the service of pragmatic considerations such as increased output and decreased bargaining costs in its treatment of works made for hire, which vest rights in an entity (the employer or commissioning party) that contributes nothing whatsoever to the intellectual labor or creative content undergirding a work. Second, copyright law’s relentless drive to vest authorial interests in a single entity, regardless of the number of people actually involved in generating a work, deprives those who would otherwise qualify as authors of rights, relegating them to a subclass dependent upon contractual bargains to claim compensation, and excluding them entirely from legal recognition as creators. Third, and ironically, copyright law is far more instrumental in its treatment of creators even than patent law—a system concerned almost exclusively with generating incentives to produce innovation rather than recognition of inventive genius. And yet, patent law’s rules for determining who qualifies as an inventor (or creator) are considerably more inclusive, and operate with harsher penalties for failure to comply, than copyright’s counterparts, despite the Romantic notion of authorial inspiration invoked rhetorically by the latter.

In short, moral rights act as a weathervane for American copyright law: whatever the rhetoric of rewarding creativity, the underlying regime readily sacrifices personality interests in favor of its theoretical orientation with producing more and better cultural output.

Prof. Daniel Benoliel, University of Haifa Faculty of Law (Israel)
“IP amid Concentration and Inequality”

The article upholds how intellectual property (IP) leads to economic centralization and income inequality. Arguably, these findings alone remain insufficient to derive policy to increase innovation-based economic growth.

Economic literature and WIPO itself attest to the finding whereby innovation proxied by patenting activity is more concentrated than other economic activities. Economic inequality is dependent, at first instance, on its rate of centralization. Competition law’s struggle against monopoly powers, on its part, assumes that

over-concentration leads to monopolization. This, in turn, exacerbates economic inequality. Does IP-related concentration increase economic inequality? Is welfare economics apt for regulating inequality-related forms of concentration of IP rights? At least for the latter question, the answer is indistinct.

From a policy standpoint, the findings arguably do not always seem sufficiently coherent for regulation purposes. The global economy's transition to a knowledge economy upon its intellectual property policy offers a disturbing case.

Firstly, at the firm level, there has been no lack of solid opinion against the concentration of patents in large corporations. Secondly, the question follows whether inequality is caused by industry or regional concentration. That is the concentration at the global level and within rich nations where IP-based goods are heavily concentrated.

As concentration-based inequality does not correlate indistinctly to economic growth or lack thereof, the findings may deserve regulatory restraint given economic inequality, complying with the “new economic geography” of the early 1990s, associated with Paul Krugman and others. The latter permit that geographical concentration of economic activities—including innovation-related ones—is inevitable and plausibly desirable.

Prof. Hannah Bloch-Wehba, Texas A&M University School of Law
“A Public Technology Option”

One effect of regulatory managerialism is an ever-expanding role for technology firms in public governance, and with it new justifications for both government and corporate secrecy. Far from opening governance to robust forms of participation and accountability, this shift has devolved power to corporate entities that invoke trade secrecy and other competitive rationales to justify opacity. In place of systemic transparency, leaks and whistleblower disclosures provide information that is crucial to public governance but inevitably selective and incomplete. The result is an informational environment in which the traditional mechanisms that govern the flow of information from the state to the public—freedom of information laws, publicization by regulators, the First Amendment right of access—have lost much of their power. In their stead, tech firms wield substantial discretion to shape the opportunities for public accountability and transparency in the modern state.

These radical information asymmetries highlight the need to rethink corporate secrecy from the ground up. This contribution sketches the contours of such a rethinking, exploring potential mechanisms for eliminating corporate secrecy in public contracting. It argues for a public technology option created by and for government agencies that competes with private market participants. Such an option can compete not only on efficacy and accuracy, but also on transparency: a public option could be free of the corporate secrecy that tends to obscure how algorithmic governance functions in practice.

Prof. Oren Bracha, University of Texas School of Law
“Copyright's Atom: The Expressive Work as the Basic Unit of Analysis” (with Talha Syed)

Copyright's outward expansion, in coverage, scope and duration, has been much discussed. Much less discussed has been copyright's inward growth. Copyright has come to be applied to an ever-growing array of expressive fragments of works, instead of expressive works as a whole. The unfortunate implications of this process are threefold. First, the extension of copyright protection to expressive fragments is supported by no plausible underlying policy. Second and even more troubling, this extension generates conceptual chaos exactly where clarity is essential, namely, at the level of copyright's fundamental basic building-block. Copyright in expressive fragments breaks up the conceptual atom of the field's fundamental unit of analysis—the expressive work—leaving behind a purposeless conceptual vacuum, which is the source of

numerous doctrinal puzzles and confusions. Third, the conceptual vacuum both facilitates and is driven by a built-in political economy pressure to expand copyright protection, based on the misguided goal of full internalization of the work's value. The way forward is to take seriously what has always been copyright's most fundamental principle: that the field and each of its rules apply to expressive works of authorship. Restoring the expressive work as the field's basic unit of analysis issues in three salutary effects. First, existing confusion and instability about copyright's object of protection is replaced by conceptual clarity grounded in purpose, which, in turn, allows numerous doctrinal puzzles, strewn across the field, to be easily solved. Second, the resolution of the doctrinal puzzles adjusts copyright to better serve its underlying policies. On the front end of eligibility for protection, application of copyright to works, and works alone, alleviates the various "anti-commons" difficulties associated with fragmentation of ownership. On the back end of infringement, denying protection to expressive fragments maintains copyright incentive/access balance thereby avoiding dangers parallel to those of outward extension of scope. Third, the doctrinal-policy tuning is done on the correct conceptual level: examining what claims fit the field's object of property, rather than ad hoc application of a hodgepodge of secondary doctrines, resulting in a doctrinal structure which is more stable and resistant to expansionist political economy pressures.

Prof. Nikola Datzov, University of North Dakota School of Law

"Find Me If You Can—An Overlooked Roadblock to IP Enforcement in Web3 Technologies"

The start of any lawsuit requires compliance with strict rules regarding how a defendant must be notified of the proceedings before the court can provide any relief, regardless of how egregious the violation may be. Those rules are structured for the realities of a physical, brick-and-mortar world, not the digital world our society is quickly transitioning to, much less the decentralized world Web3 promises to bring. While the Federal Rules of Civil Procedure allow some flexibility to allow for service through "alternative means," historically, courts have been reluctant to allow parties to utilize this flexibility in a robust way. This summer, a state court in New York permitted a plaintiff to effect service through an NFT, since the defendant's identity—much less location—was unknown. Although the decision permitted service via an entirely new method, the concept is not unprecedented. For example, courts have permitted service through similar unique-identifier approaches such as an unique Amazon, Facebook, or Twitter account identifier, when a defendant may be difficult to track down. As Web3 continues to have a greater impact, and more people move within its scope, there will need to be greater reliance on what have been viewed as the exceptions to traditional means for service. As such, the Federal Rules of Civil Procedure for service of domestic defendants will need to be modified to allow IP rights holders to meaningfully enforce their rights in the digital space.

Prof. Stefania Fusco, Notre Dame Law School

"Does the EU Market Need an *eBay*-like Case? Evidence Against Granting Automatic Injunctions in Europe" (with Valerio Sterzi)

Approximately ten years after signing the Agreement on a Unified Patent Court (UPC Agreement) on February 19, 2013, the European Unified Patent Court (UPC) finally appears to be close to opening its doors. The commencement of the UPC's operations will be determined by the entry into force of the UPC Agreement, which will occur on the first day of the fourth month after the deposit of the German ratification instrument. It is expected that Germany will fulfill this requirement during the last quarter of 2022 or early 2023. Thus, there is currently significant debate in Europe about the future of its patent law. For example, while it is clear which law the UPC will apply to determine the validity and enforcement of European patents, many questions remain about which existing EU jurisdictions will be the most influential on the interpretation of this law by the new court.

This paper focuses on a fundamental aspect of patent law: the granting of injunctions. Currently, European countries have slightly different approaches on how automatic the granting of an injunction should be once

a plaintiff is able to show the likelihood of prevailing on the merit. Germany, the country with the highest number of patent cases in the EU, is known to be a jurisdiction in which plaintiffs have been very successful in obtaining injunctions. However, the same result is harder to obtain in other EU countries. This paper provides empirical evidence against the automatic granting of injunctions by the UPC. We present evidence derived from a comprehensive dataset of infringement actions during the 2007-2020 period. Specifically, we focus on patents filed at the European Patent Office (EPO) and infringement actions initiated in the five most non-practicing entities (NPEs)-targeted jurisdictions in Europe, namely Germany, the U.K. (England and Wales), France, Italy, and The Netherlands. Based on this evidence, we argue that the UPC should avoid following the example of German courts with respect to injunctions and adopt an approach closer to the solution that the United States Supreme Court found in *eBay* in 2006 instead.

The *eBay* case was triggered by the exponential growth of NPE activity in the US and the consequent concern that such activity was inhibiting innovation. Over the past ten years, NPE activity has increased significantly in Europe in the Electrical Engineering field, in which almost 9% of all patent transactions have at least one NPE among the patent acquirers. Moreover, the operation of patent profiteers has become common in the EU market. Consequently, the issue of whether the activity of these entities conflicts with the fundamental function of patent protection in promoting innovation has now gained more attention in Europe. Following the US debate on NPEs, the question of whether the operation of NPEs truly harms innovation has always been present in Europe. However, the significant increase in NPE activity has augmented the awareness of the potential harmful impact of NPE activity on the EU market.

Our paper contributes to this debate and suggests that we have reached a point in which the European market, similar to the US market before, would benefit from more restrictive grants of injunctions in patent law. While drawing a complete parallel about the impact of NPE activity on the EU and US markets would be inappropriate, we believe that much can be learned from the US experience to guide future decisions of UPC in the context of granting injunctions.

Prof. Aman K. Gebru, University of Houston Law Center
“Scaling Authorship”

The individual creator is at the core of copyright law. While co-authorship rules have been designed to address collaborative creative expression, the system seems to still insist on finding distinct authors in whom initial ownership can vest. This article questions whether these co-authorship rules can maintain their viability when applied in the context of large-scale creative collaborations where numerous authors participate without formal legal relationships with each other. The project uses three instances of large-scale “collective creative expressions” as case studies—hackathons, memes, and traditional cultural expression. Hackathons are competitions where various participants use software to solve a defined social or technical problem in a relatively compressed timeline. Memes are humorous images and videos with accompanying text that are rapidly shared on online platforms. Traditional cultural expressions are broadly defined as the cultural expressions of indigenous communities usually developed over generations. These examples are admittedly different in important respects including the timeline of creative expression and the expectation of participants. However, they are similar in ways that reveals what this article seeks to highlight. In all three contexts the creative output is a product of contributions by several individuals whose distinct contributions are not tracked and as a result copyright law’s co-authorship rules seem to be a poor fit as a governance framework. Copyright law’s insistence on finding distinct author(s) seems to emanate from its preference for economic efficiency and predictability. While these interests are important, a question remains whether these interests should be prioritized over other values, needs, and expectations of the relevant creative communities. The three case studies of collective creative expression seem to involve competing interests of open-ness, informality, and non-economic interests. These competing values could suggest alternative governance frameworks for similarly situated large-scale informal creative collaborations.

Prof. Timothy T. Hsieh, Oklahoma City University School of Law
“A Comprehensive Proposal for a Unified Federal Patent District Court”

This paper provides a comprehensive proposal of a unified federal patent district court. Other similar courts such as bankruptcy and tax courts are examined in order to propose an analogous federal judiciary structure. Essentially, the court will be the sole destination where every patent case in the United States will be filed. This court will consist of a panel comprised of existing federal judges (Article III or U.S. Magistrate) considered to be experts in adjudicating patent cases who are also allowed to sit at this court by designation and who need not leave their current posts as federal judges. There may also be new federal judges hired just to sit at this court as well. All the patent cases filed at this court will then be randomly assigned to this panel of judges through a “wheel” similar to the Patent Pilot Program. This eliminates venue and geographic filing/litigation concerns. Also, although it may not be necessary for this court to have a physical “situs”—it may be preferable to have a brick-and-mortar location either in an area located within the very middle of the United States (e.g., Oklahoma) or Washington D.C. There will also be efforts to encourage cases to be held “virtually”—perhaps even over the Metaverse or in a Web 3.0 environment—similar to how some proceedings at the Patent Trial and Appeal Board are conducted over videoconference software. A scientifically trained jury is also proposed, and it is also suggested that the small claims patent court currently being researched shall be integrated within this court. Finally, a suggested name for this court will be the “U.S. District Court for the Federal District” due to how the U.S. Court of Appeals for the Federal Circuit is currently the sole exclusive Appellate Court that can hear patent appeals.

Prof. Eric E. Johnson, University of Oklahoma College of Law
“Seeking Sense in the Right of Publicity’s Three Faces”

This paper attempts a comprehensive re-evaluation of theoretical justifications for the right of publicity. In previous work, I suggested that what courts and commentators call the “right of publicity” is really more accurately viewed as three separate rights: an endorsement right, a merchandizing entitlement, and a right against virtual impressment. More specifically, my prior work argued that the vast bulk of cases with a successful “right of publicity” claim can be sorted into three clusters, each of which corresponds to a distinct concept of liability. In my current paper, I use my prior work’s three-claim breakdown to engage in a reappraisal of the theoretical rationales offered for the right of publicity—to support its recognition and delineate its proper scope. Those rationales include Lockean labor-desert theory, personal autonomy, economic incentives to create or invest, prevention of waste by overgrazing, and consumer protection. My paper argues that the offered rationales map differently onto the three forms of the right of publicity. In addition, the paper’s analysis tends to confirm the usefulness of thinking of the right of publicity as three different causes of action, and it suggests ways to be more precise and more productive in debating the desirability of the recognition of right of publicity claims and their proper scope.

Prof. Daryl Lim, Penn State Dickinson Law
“Adaptation”

This presentation offers three reflections on the theme of adaptation in IP law and policy. The first assesses the impact of disruptive technologies like AI and recent dramatic geostrategic shifts. The second considers the rise of social justice and inclusive innovation. Finally, the third offers recommendations for IP law and education to adapt to these changes.

Prof. Doris E. Long, University of Illinois Chicago School of Law

“Combatting Climate Change: Hard Earned Lessons from the Health Wars”

In the past two years, as the world faced the COVID-19 pandemic, we got a crash course in the gaps in our current global IP system for assuring equitable, socially-just access to the medicines, equipment and tools required to combat this deadly scourge. But as we struggle with this ongoing global challenge, another long-simmering threat-to-life has become increasingly clear—global climate. Many are already creating new protocols and techniques to meet this challenge. There is little doubt that we can and should be using the lessons we learned with regard to patent waivers, compulsory licenses, voluntary and open tech licensing protocols, etc. to green patents and pollution control devices. But there are other challenges of global climate change—biodiversity, architecture and structural integrity, and land resource integrity—that also need to be addressed. These are similar to the “side issues” that were ignored during the early stages of the recent pandemic—treatment protocols; protection and delivery tools including masks, syringes and ventilators that are largely unpatented but frequently unavailable; and the need for clearer access to data to test, resolve and modify protections as needs change. These climate change “side issues” are as critical and time sensitive as pollution control and green patents. I will explore adapting some techniques and practices we learned late in the pandemic for similarly situated “side issues” so that we can meet all aspects of equitable access to all technology, tools, etc. required to successfully combat changing climate based challenges. We need to start establishing the framework for legal control to get those changes established now before we have to play a faster game of catch up than we already do.

Prof. Timothy J. McFarlin, Cumberland School of Law, Samford University

“A Copyright Restored: Mark Twain, Mary Ann Cord, and How to Right a Longstanding Wrong”

Did Mark Twain and the *Atlantic* infringe a copyright belonging to Mary Ann Cord in the telling of how enslavers tore her family apart and how her son returned years later, as a Union soldier, to liberate her from bondage? If so, might that long-ignored infringement be remedied today?

This Article answers these questions and, in so doing, provides wide-ranging insights into how the doctrines of consent, estoppel, laches, abandonment, adverse possession, escheat, and the statute of limitations apply in copyright law. Cord’s case—nearly a century-and-a-half-old but examined for the first time in this project—can also help chart a course for how to address other longstanding wrongs in intellectual property and beyond. This includes those raised in recent lawsuits against Harvard University, for its exploitation of enslaved people’s images, and Tulsa, Oklahoma, for its role in the 1921 race massacre on Black Wall Street.

The project’s first part, “A Copyright Ignored,” forthcoming in the *Journal of the Copyright Society of the U.S.A.*, focuses on the issue of copyrightability and argues that Cord was an author who had a common-law copyright in the words she spoke to Twain.

This second part, “A Copyright Restored,” tackles the issues of infringement and remedy, arguing that (1) Twain and the *Atlantic* likely violated Cord’s rights by publishing her expression without her consent and (2) a claim could perhaps be brought by her descendants today. Given that it continues to publish and promote “A True Story, Repeated Word for Word as I Heard It,” I propose that the *Atlantic* should seek out Cord’s descendants and consider—among other potential remedial actions—adjusting the credit to recognize Cord, not just Twain, as the work’s author.

In this way, a copyright once ignored can be now in some sense restored, setting an important precedent for righting longstanding wrongs when and how best we can.

Prof. Andrew C. Michaels, University of Houston Law Center

“Appropriation Art and Free Expression in Trademarked NFTs”

Non-Fungible Tokens (NFTs) are unique blockchain based tokens that are being used recently by digital artists to distribute their art and create artificial scarcity in such digital artwork. Cases are arising in federal courts where NFT creators or artists are being sued for trademark infringement, where their digital artwork arguably appropriates trademarks. The artists often argue that their NFT based digital artwork is protected (at least to some extent) against such trademark claims by the First Amendment. These cases raise interesting questions about the scope of free expression protection in the context of “appropriation art” generally, and particularly in the relatively new context of NFT based digital artwork.

Prof. Alina Ng Boyte, Mississippi College School of Law

“The Social Value of Intellectual Property”

Much has been written about the economic value of intellectual property to owners of exclusive rights over creative works and innovation protected by copyright and patent laws respectively. There is a lot of literature about the public welfare to have access and increasing the efficiencies of intellectual property markets protected by these time-bound and legally limited government sanctioned rights. This paper examines a different aspect of intellectual property that is less examined in the literature. While most copyright and patented works are produced for market rewards with some produced for the sake of individual expression and innovation alone, intellectual property can also have significant social value if produced and distributed with the goal of creating value for communities and society. While the social value of intellectual property does not minimize its economic value, this paper argues that there is a need for intellectual property producers to be aware of the impact their work has on their communities and in society and to try to align their economic goals with social goals. To align economic and social goals in the production and creation of creative and innovative works, this paper proposes legal responses that are outcomes focused, enabling and empowering, and supplement intrinsic motivations with intrinsic ones.

Prof. Amanda Reid, UNC School of Media and Journalism

“Analyzing Big Tech Transparency Reports”

Prominent information and communications technology companies (“Big Tech”) are under increased scrutiny from regulators and consumers. One strategy to deflect criticism has been to voluntarily issue “transparency reports.” In 2010, Google issued its first transparency report. Twitter followed suit in 2012 and Facebook in 2013. Today, these reports have a two-fold purpose: (1) to disclose law enforcement requests for customer data and (2) to give insights into content moderation practice. Policymakers have shown an interest in such disclosures. Indeed, there is a growing appetite to mandate transparency reports (e.g., Florida; Texas; New York; California; UK; Germany). Yet this interest in transparency reports exists in an inverse relationship with the empirical analysis on transparency reporting. To fill this gap, this project makes a two-fold contribution to ongoing discussions about transparency reporting: (1) a longitudinal analysis of news coverage of transparency reports (1999-2021) and (2) an analysis of all reports (N=91) that contain data from 2020. The findings serve to inform who is paying attention to transparency reports and how much scrutiny they receive, as well as creating a baseline for the field and offering an empirical overview of the state of the art of Big Tech transparency reporting.

Prof. Sandra L. Rierson, California Western School of Law (Spring 2023)

“Trademark Law and the Creep of Legal Formalism”

Approximately 75 years ago, the Lanham Act codified and largely federalized the common law of trademarks in the United States. The Lanham Act was intended to embody legal realism, a philosophy “arguing against mechanical application of laws by courts, instead urging mindfulness of the law’s

interpretation and import in the real world.” In doing so, the Act turned away from legal formalism, under which “results in individual cases were accomplished not by an assessment of competing principles and policies, but rather an ‘automatic’ application of rules deduced logically from greater principles that supposedly dictated a single, correct result in every case.” The Lanham Act therefore recognized and extended trademark protection to marks based on the manner in which they were perceived by consumers in a commercial context, eschewing bright-line rules in favor of the flexible “likelihood of confusion” standard that anchors trademark law today.

However, the Lanham Act’s codification of trademark doctrine, as interpreted by the judiciary, has led to an accretion of formalistic rules that threaten to undermine the dual intended purpose of trademark law: consumer protection and the elimination of unfair competition. The creep of legal formalism in trademark law is reflected in doctrines such as genericism and functionality, both of which act as complete bars to trademark protection. The courts’ interpretations of these doctrines, as they have been codified in the Lanham Act, seek to impose bright-line, formalistic rules when a more flexible approach is warranted. The cause of action for trademark dilution, which was added to the Lanham Act in 1995 and substantially expanded in 2006, creates arguably monopolistic trademark rights in any mark that is considered “famous” under the definition of the Act. By supplanting the “likelihood of confusion” standard for famous marks, trademark dilution weakens the foundations of federal trademark law in legal realism.

The allure of bright-line rules lies in their supposed simplicity and predictability, which should enable trademark holders to structure their actions accordingly. However, when those rules are perceived as arbitrary, and when they fail to take into account the real-world context in which trademarks exist, they fail to achieve these goals. Trademarks may be both over- and under-protected under the law, leading to anti-competitive results that are ultimately harmful to business owners and consumers alike.

Prof. Ned Snow, University of South Carolina School of Law
“Copyright, Commerce, and Knowledge”

What is the relationship between the purpose of copyright law—the promotion of knowledge and learning—and the means for realizing that purpose—the commercial incentive of a monopoly? Does the commercial means necessarily lead to the desired social end? I argue that it does not. In practical application, the promise of a commercial benefit as a means for realizing knowledge production raises three tensions. First, the promise of commercial benefit incentivizes expressions that are most profitable, and profitable expressions do not necessarily reflect that which furthers knowledge. Second, the realization of commercial benefit provides resources for commercially driven actors to influence the boundaries of copyright law; that fact results in rules that are premised on commercial benefit as the end of copyright law rather than the means for realizing a socially distinct end. Third, the commercial means relies on a financial market that is subject to failures, and those failures preclude copyright from accurately capturing the public’s valuation of expression. Commerce, then, is an imperfect—and in some instance counterproductive—means for achieving the desired social end. How should lawmakers deal with this tension? I propose that courts employ several existent doctrines in a way that ensures that commerce does not overtake knowledge as the purpose of copyright law.

Prof. S. Sean Tu, West Virginia University College of Law
“The Long CON: An Empirical Analysis of Pharmaceutical Patent Thickets”

Over the past two decades drug manufacturers have steadily increased the intensity of patenting around their drugs with 1.86 patents per active ingredient in 2001 and almost 6 patents per active ingredient in 2019. This three-fold increase in patenting has led to a dense web of overlapping intellectual property rights called “patent thickets.” These thickets can include dozens and sometimes hundreds of less innovative “secondary” patents. Many of these secondary patents use a special “continuation” application (CONs),

which allows brand manufacturers to spawn additional patents from a previous patent family member without disclosing anything new. This process allows brand manufacturers to quickly create less innovative nuisance patents that are designed to delay or deter generic market entry. This article focuses on the use of CONs in the creation and enforcement of pharmaceutical patent thickets.

This study analyzes data on all continuation applications from 1970 to 2022 and links these applications to subsequent patent litigation from 1970 to 2022. We focus on continuation applications filed more than five years after the original application issued (“Long CONs”). When we compare Orange Book patents against all other technology groups, we show that Long CONs are usually part of large patent thickets and are strategically important components of brand firm litigation. We find that the use of Long CON applications has steadily increased over the last 3 decades, but this increase is more pronounced for Orange Book patents.

Long CONs represent only 8.3% of all continuation applications, however, Long CONs represent 24% of all litigated patents. Additionally, 56% of all Long CONs come from just a few industries. The pharmaceutical industry disproportionately file and litigate Long CONs patents. These data show that patent thickets created by continuation applications have a disproportionate effect on litigation, which may result in higher drug prices for longer periods of time.

Prof. Saurabh Vishnubhakat, Benjamin N. Cardozo School of Law, Yeshiva University
“The Coming Copyright Judge Crisis” (with David Fagundes)

Commentary about the Supreme Court’s 2021 decision in *United States v. Arthrex, Inc.*, has focused on the nexus of patent and administrative law. But this overlooks a momentous and as-yet unappreciated copyright implication of the decision: it renders the Copyright Royalty Board (CRB) unconstitutional. The CRB has suffered constitutional challenges since its 2004 inception, but these were seemingly solved in 2011 when the D.C. Circuit held that its composition did not offend the Appointments Clause as long as Copyright Royalty Judges were removable at will. But when the Court invalidated the selection process for Administrative Patent Judges on a similar theory in *Arthrex*, it rejected the D.C. Circuit’s remedy, making the CRB unconstitutional—again. This problem is not insoluble, though, and the best of the available options would be to make CRJs subject to Presidential appointment with Senate approval. This Essay highlights this novel insight about *Arthrex*, proposes legislative and judicial solutions, and illustrates the implications of the argument for copyright’s administrative law and Appointments Clause jurisprudence.

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“War and IP”

The 2022 war between Russia and Ukraine has raised questions about the protection and enforcement of intellectual property rights in the event of an armed conflict. As important as it is, this topic has not been the subject of much analysis in the intellectual property literature. To fill this lacuna, the present Article explores the international intellectual property obligations of countries that are directly involved in an armed conflict as well as third countries. Because the international intellectual property regime provides the former with more policy space, including through the national security exception, this Article further explores measures that the latter could take to protect local intellectual property rights holders who may be affected by the armed conflict.