



8th Annual Texas A&M Intellectual Property Scholars Roundtable

FINAL PROGRAM

FRIDAY, NOVEMBER 8, 2024

8:30 **Breakfast**

9:00 **Welcoming Remarks**

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

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

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

Presenters: Dr. Justin Koo, Faculty of Law, University of the West Indies, St. Augustine (Trinidad and Tobago)
“De-Colonising Copyright Law”

Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law
“Incentives and Music Composition”

Dr. Emma Perot, Faculty of Law, University of the West Indies, St. Augustine (Trinidad and Tobago)
“Navigating the Copyright Fact Versus Expression Division While Avoiding Substantial Fictionalization in New York”

10:45 **Coffee Break**

11:15 Panel 2: Artificial Intelligence I

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

Presenters: Prof. Robert Bohrer, California Western School of Law
“AlphaFold 3, AI, Antibody Patents, the Future of Broad Pharmaceutical Patent Claims and Drug Development” (with Brendan Bargmann)

Prof. Nikola Datzov, University of North Dakota School of Law
“Toward Automated Justice”

Prof. Zvi Rosen, Southern Illinois University School of Law
“AI and Its Antecedents at the Frontiers of Authorship”

12:45 Lunch

2:15 Panel 3: International IP and Technology Issues

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

Presenters: Prof. Stefania Fusco, University of Alabama School of Law
“Does the EU Market Need an *eBay*-like Case? Evidence Against Granting Automatic Injunctions in Europe”

Prof. Francisco Tschen '03 '05, Florida International University College of Law
“The Role of Rule 55 in Foreign Priority: Assessing Its Impact in Preserving Foreign Priority Rights in the U.S.”

3:30 Coffee Break

4:00 Panel 4: Trademark Law

Moderator: Prof. Stefania Fusco, University of Alabama School of Law

Presenters: Rachael Dickson, Esq.
“Discrimination in the Trademark ID Manual”

Prof. Timothy T. Hsieh, Oklahoma City University School of Law
“‘The Past Is Never Dead, It’s Not Even a Trademark or Copyright’: William Faulkner and the Elusive Boundary Between Intellectual Property Forms No One Talks About”

Prof. Barbara Lauriat, Texas Tech University School of Law
“Trademark History in *Vidal v. Elster* (2024)”

Prof. Eric E. Johnson, University of Oklahoma College of Law
“Unpacking Trademark's Pathology”

5:45 Roundtable Adjourns for the Day

7:00

Dinner for Roundtable Participants

Waters

301 Main Street, Fort Worth

SATURDAY, NOVEMBER 9, 2024

9:00 Breakfast

9:30 Panel 5: Trademark and Indigenous Knowledge

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

Presenters: Prof. Jake Linford, Florida State University College of Law
“Content-Based Trademark Regulation: Trademark Law’s Effect on Speech Is ‘Too Small,’
But Why?”

Prof. Alina Ng Boyte, William S. Richardson School of Law, University of Hawaii
“Indigenous Knowledge and Sustainable Food Systems”

10:45 Coffee Break

11:15 Panel 6: Artificial Intelligence II

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

Presenters: Jeffrey Greenbaum, Ph.D. Candidate, Department of Economics, University of California,
Berkeley; J.D. Candidate, Indiana University Maurer School of Law
“When Should Training an AI Model Prevail as Fair Use Against Copyright Infringement
Under *Andy Warhol*?”

Prof. Michael D. Murray, J. David Rosenberg College of Law, University of Kentucky
“Deceptive Exploitation: Deepfakes, the Rights of Publicity and Privacy, and Trademark
Law”

Prof. Peter K. Yu, Texas A&M University School of Law
“Bridging the Global Artificial Intelligence Divide”

12:45 Closing Remarks

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

12:50 Lunch

6:00 Dinner for Roundtable Participants

Wild Salsa
300 Throckmorton St, Fort Worth

Commentators

- May Har-Shai, Ph.D. Candidate, The Buchmann Faculty of Law, Tel Aviv University (Israel)
- Prof. Jeff W. Slattery, Texas A&M University School of Law

ABSTRACTS

Prof. Robert Bohrer, California Western School of Law

“AlphaFold 3, AI, Antibody Patents, the Future of Broad Pharmaceutical Patent Claims and Drug Development” (with Brendan Bargmann)

AlphaFold 3, the most recent version of Google’s DeepMind artificial intelligence (AI) engine used to predict protein structures, is a breakthrough AI with major significance for monoclonal antibody patents, pharmaceutical patents in general, and the future of drug development and the pharmaceutical industry as a whole. It is so great a contribution to science that its creators have been awarded the 2024 Nobel Prize in Chemistry. AlphaFold 3 and similar applications fundamentally alter the factual predicates on which the Supreme Court’s decision in *Amgen Inc. v. Sanofi*, defining the permissible scope of monoclonal antibody patents, is based. We argue that AlphaFold 3 should support broad patent claims for the developers of therapeutic monoclonal antibodies to novel targets and revolutionize the half-trillion-dollar therapeutic antibodies market. We conclude with a brief discussion of the role of patents and the pharmaceutical industry in a future where much of drug development will be done in silico, many of the types of inventions that are patentable today will become obvious, and the risk of drug development will be far lower than it is today.

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

“Toward Automated Justice”

“All rise, the Honorable [Judge AI] now presiding.”

Since their creation, courts around the world have always shared one common element: a human judge tasked with administering justice. This foundational principle, however, is no longer true. In the last three years, developments in artificial intelligence (AI) have presented unprecedented capabilities for legal writing, legal analysis, and legal decision-making to be performed by automated technologies. This AI Revolution, among other things, has led to the first adoptions of automated adjudicators and judicial “employees.” Courts in China have already implemented fully autonomous AI systems to resolve some legal disputes without human intervention. In Europe, a charter for the ethical use of AI in judicial systems has paved the way for adopting AI systems to complete judicial work in European courts. Although a transformation of the judicial role and the digitization of courts in the United States have paved a clear path toward incorporating AI into the work of judges, AI’s arrival at the courthouse steps has been largely ignored. This unfortunate oversight has left the incorporation of AI technology for judicial decision-making at the hands of individual judges—without any formal guidance on its capabilities, limits, and risks.

Allowing AI to perform certain judicial functions certainly presents an opportunity for massive efficiency gains that would be a welcome boon to overburdened court systems. However, its incorporation and replacement of human actors within a judge’s chambers raises a host of complex issues—increasing in concern with the sophistication of the delegated task. Thus, before considering which judicial functions AI can and should replace, it is essential to first understand the work actually performed by judges and their chambers’ staff, the details of which are often significantly misunderstood by people not familiar with the process. To help bring clarity to the emerging conversation, this article proposes a novel framework—similar to the framework for

autonomous vehicles—that categorizes the work of AI judges into different levels and tiers, namely AI-assisted, AI-led, and AI-automated judges.

Moreover, beyond the complex normative issues surrounding AI use by judicial actors lurks the even more fundamental question of how to ensure appropriate oversight and regulation for implementing AI into the judiciary. Unlike most actors in the judicial system, the U.S. Constitution affords very limited means to govern the work of federal judges. While an important pillar for ensuring judicial independence, such insulation generally puts regulating judicial AI beyond the reach of Congress or any other regulatory agency. Compounding the problem is the secretive nature through which judicial decisions are made. Thus, without formal guidance, the adoption of AI is left to the unfettered discretion of each judge—an approach that lacks adequate assurances for a just and fair process.

This article provides several significant contributions regarding the path of U.S. courts toward automated justice. First, the article demystifies the judicial process, categorizes what work judges and their staff perform, and explains how judicial decisions are actually made. Second, it provides a descriptive account of the courts’ transition toward an AI-ready judiciary, and the evolving capabilities of AI to perform judicial work. Third, to help frame and structure future discussions of AI’s role in performing judicial tasks, the article introduces a novel taxonomy that organizes the suitability of AI performing various judicial functions. Fourth, the article addresses the key challenges that will likely raise concern for incorporating AI into the judiciary and offers new perspectives on the important normative questions surrounding automated judicial decision-making. Finally, the article proposes a judge-led framework of “guided discretion” for governing judicial use of AI.

The goal of the article is not to hyperbolize a scenario in which the U.S. judiciary becomes an automated conveyor belt that produces cookie-cutter servings of justice. Rather, the purpose of the project is to draw attention to the emerging significant impact of AI to the judiciary’s evolving function and role in modern society so that the work of courts can benefit from the new capabilities of advanced technologies while still preserving the bedrock principles fundamental to a judicial system in a democratic society.

Rachael Dickson, Esq.

“Discrimination in the Trademark ID Manual”

In the U.S. Patent and Trademark Office’s *Trademark Identification Manual* (a searchable database of over 65,000 identifications of goods and services deemed acceptable by the USPTO for use in a trademark application), you’ll find many unusual goods and services, ranging from “toy figures in the form of a potato” (Class 28) and “financial evaluation of alpaca fiber” (Class 36) to “placebo pills and mixes for the psychological benefit of cleansing one’s karma” (Class 05) and “writing pens that may also be used to perform pen spinning tricks” (Class 16).

What you won’t find, however, is anything relating to cannabis as a controlled substance, even though certain hemp goods have been federally lawful in the U.S. since 2018. You also won’t find identifications for politicized medical services providing abortion, contraceptive, sexual health, or gender-affirming healthcare, nor will you find identifications relating to many “vice” goods and services.

Such omissions cause direct harm to applicants who cannot access the lower filing fees of the TEAS Plus application and cannot rely on ID Manual examples to ensure that their own IDs meet the USPTO's stringent requirements. Data also indicates that the presence of a good or service in the ID Manual may have a legitimizing impact on industry filing behavior, as filings for marks used with specific goods/services consistently increase after an ID is added to the Manual. Industries who cannot get identifications of their goods and services into the ID Manual are unable to access these benefits.

Many of my own attempts to add omitted goods and services to the ID Manual have been refused by the USPTO for a variety of arbitrarily and inconsistently applied reasons. This strongly indicates that the USPTO is deliberately avoiding putting anything in the ID Manual which may cause political controversy.

This pattern of behavior discriminates against lawful businesses and goes directly against the USPTO's stated goals of "promoting the efficient delivery of reliable intellectual property rights." It also continues the trademark office's decades-long pursuit of "continued purification" in its discrimination against marks and services relating to sexual health, drugs, nudity, and other less favored goods/services, continuing a trend previously advanced by the now struck-down bars on disparaging and scandalous content.

Prof. Stefania Fusco, University of Alabama School of Law

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

Approximately ten years after signing the Agreement on a Unified Patent Court (UPCA) the European Unified Patent Court (UPC) finally opened its doors on June 1, 2023. The UPC is a multinational patent court whose decisions cover the whole territory of the 24 Member States of the European Union (EU) that have signed and ratified the UPCA. The commencement of the UPC's operations generated significant debate in Europe about the future of its patent law. For example, while it is clear which law the UPC is required to apply, 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 2010–2019 period. Specifically, we focus on infringement actions initiated in five large European jurisdictions, namely Germany, the U.K. (England and Wales), France, Italy, and The Netherlands. We consider the characteristics of the pairs of firms (plaintiffs and defendants) involved in the identified lawsuits. The analysis reveals that the plaintiffs and defendants operate in different industries in almost 75% of cases, with significant variability across industries and technological fields. The econometric results show that these cases are associated with patents of relatively low economic value, that are old and

where settlement is less frequent. Moreover, we provide a full analysis of the injunctions granted by the UPC during its first year of operation.

Jeffrey Greenbaum, Ph.D. Candidate, Department of Economics, University of California, Berkeley; J.D. Candidate, Indiana University Maurer School of Law

“When Should Training an AI Model Prevail as Fair Use Against Copyright Infringement Under *Andy Warhol*?”

AI largely uses aesthetic and creative works during the training process to teach an AI model a skill. This use can prevail against copyright infringement under the fair use defense if using a work for training has a transformative purpose that is sufficiently different from the purpose of the original work. In isolation, training is a non-aesthetic and computational process that does not produce tangible output, which has led several scholars to conclude that this non-expressive aspect of AI should generally prevail as a fair use.

This paper explores this perspective further by analogizing AI with the few existing cases about other data-intensive technologies to offer predictions and recommendations about when a court should grant a fair use. This paper makes several contributions. Using recent cases for data-intensive technologies enables me to explore more nuances of how courts have applied the fair use doctrine. In doing so, I identify six features of these technologies that have enabled defendants to demonstrate that their technologies have a transformative purpose meriting a fair use. I then interpret these features in the context of recent Supreme Court precedent that discounts the role of expression in favor of the purpose of why the AI model is using the work. I conclude with examples of AI models that should prevail and AI models that should not prevail to highlight the predictions that this analysis implies. These contributions depart from the scholarship by reaching more mixed results about whether training an AI model should prevail as a fair use.

Prof. Timothy T. Hsieh, Oklahoma City University School of Law

“‘The Past Is Never Dead, It’s Not Even a Trademark or Copyright’: William Faulkner and the Elusive Boundary Between Intellectual Property Forms No One Talks About”

In the 2013 federal case of *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, the Estate of William Faulkner sued Sony Pictures due to Woody Allen’s film *Midnight in Paris* having a character refer to the Faulkner quote “The past is never dead. It’s not even past” from *Requiem for a Nun*. In the suit, the Faulkner Estate alleged copyright infringement as well as trademark appropriation under the Lanham Act. A 2012 suit, *Faulkner Literary Rights LLC v. Northrop Grumman Corp.*, also occurred where the Faulkner Estate sued aerospace defense technology company Northrop Grumman for using the same quote in a 2011 advertisement placed in *The Washington Post*. Both cases not only dealt with trademark law, the copyright law doctrine of fair use and also *de minimis* usage of copyrighted material, but also the fascinating quandary of where one draws the line between a copyright and a trademark, e.g., when does a slogan or title become too long to trademark and proper to copyright and vice versa, when does a copyrightable line of literary text become too short to copyright and proper to trademark? This boundary between a copyright and a trademark is one seldom analyzed by the legal literature out there, and almost overlooked or even dismissed as a simplistic concept not worth a deeper look. However, these cases involving the infamous Faulkner line compel the conclusion that the difference between a trademark and a copyright might be a much more complex determination to make. By analyzing these two cases, the history of cases differentiating a trademark and a copyright or the “trademark-

copyright” boundary, and the potential usage of similar lines from Faulkner’s work, this paper will discuss how one of William Faulkner’s most enduring and timeless lines pushes the boundaries of a cutting-edge but little analyzed concept in intellectual property law.

Dr. Justin Koo, Faculty of Law, University of the West Indies, St. Augustine (Trinidad and Tobago)
“De-Colonising Copyright Law”

This project seeks to critically assess whether the copyright laws adopted by developing English-speaking Commonwealth countries are fit for purpose and if not, how should the copyright framework be reshaped to better account for the realities of such countries. Historically the development of copyright laws in the Commonwealth was guided by international treaties and the jurisprudence of the former colonisers, namely, the United Kingdom. As a result, the copyright laws that have been imposed on developing Commonwealth countries do not necessarily reflect their needs and realities.

Therefore, this project will conduct a TWAIL (third world approaches to international law) analysis to determine the shortcomings of the existing international and domestic copyright law frameworks, and in response propose a more functional, fair and sustainable approach that better represents the interests and needs present in developing Commonwealth countries. Thus, this project will: (1) identify the key interests and needs that are not currently accounted for in the international copyright treaties; (2) demonstrate the aggregate shortcomings and challenges faced by developing Commonwealth copyright systems and the resulting practical consequences; (3) assess the viability of borrowing copyright concepts from other former colonies that have become developed countries; and (4) propose the reformation of key copyright concepts that better accounts for the interests and realities of developing Commonwealth copyright countries.

Given the vast nature of available copyright jurisprudence, this project will focus on the key concepts of subject matter, originality, authorship, ownership, exclusive rights and exceptions and limitations. The proposals developed in addressing these concepts can be used as the basis for drafting a new international copyright treaty that is more inclusive and representative of the interests and realities of the modern world especially from the perspective of developing countries.

Prof. Barbara Lauriat, Texas Tech University School of Law
“Trademark History in *Vidal v. Elster* (2024)”

In the recent US Supreme Court case of *Vidal v. Elster*, Justice Thomas’s majority opinion relied directly on historical accounts of the development of trademark law to analyze the constitutionality of the Lanham Act’s names clause. While the Court was unanimous on the outcome of the case, Thomas’s approach prompted concurring opinions directly challenging the logic and legitimacy of using selective examples from history to determine the constitutionality of a modern trademark regime that the Framers of the Constitution could not have contemplated, as well as the accuracy of the history presented.

This paper will examine the historical narrative the majority provides to support of the constitutionality of the names clause, in which Thomas claims that requiring permission for trademark registration of the personal names of identifiable living persons is a longstanding common law principle. In fact, caselaw and other primary sources from the nineteenth century show the opposite to be true, suggesting that the skepticism expressed in the concurring opinions

was well justified. While a doctrine based on the right to use one's own name in association with one's business was recognized as early as the eighteenth century, that doctrine is distinct from the publicity-based right of a non-trading individual to prevent the use of one's name or image as a trademark by others. The latter was not incorporated into American trademark law until the early twentieth century and did not emerge at all in many other common law jurisdictions.

Prof. Jake Linford, Florida State University College of Law

“Content-Based Trademark Regulation: Trademark Law’s Effect on Speech Is ‘Too Small,’ But Why?”

Twice in the last seven years, the Supreme Court invalidated two provisions of the Lanham Act that barred the registration of disparaging marks and immoral and scandalous marks, respectively. But when invited to apply heightened judicial scrutiny to judicial enforcement of trademark rights rather than the registration regime, in *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, the Court held that when defendant uses the contested trademark as a source indicator, courts should apply “ordinary trademark scrutiny” rather than some speech-protective test. Last term, the Supreme Court held in *Vidal v. Elster* that section 2(c) of the Lanham Act did not run afoul of the free speech clause of the First Amendment. The Court reached this conclusion despite deciding that section 2(c) was a content-based trademark restriction. Many content-based restrictions trigger heightened scrutiny, but all nine justices agreed that a content-based trademark restriction did not necessarily trigger heightened scrutiny.

The Court in *Elster* was otherwise fractured. Five Republican appointees held that in this case, the long history of denying trademark registration in the names of others was sufficient to conclude section 2(c) “does not violate the First Amendment.” Justice Barrett and the three Democratic appointees concurred in the result, but would have held that section 2(c) was a reasonable content-based restriction on speech, compatible with the First Amendment because it was consistent with trademark law’s purposes of facilitating source identification and preserving mark owner goodwill.

The fractured opinions in *Elster* highlight three significant trends in First Amendment jurisprudence: First, the Court appears reluctant to apply strict First Amendment scrutiny to intellectual property regulations. Second, led by Justice Thomas, some justices advocate for a historical approach to First Amendment analysis, focusing on historical precedent rather than original constitutional meaning. Third, the Court’s democratic appointees, joined by some conservative justices, favor a more flexible reasonableness analysis over rigid scrutiny tiers in some commercial contexts.

Questions remain about how courts will handle future trademark challenges, particularly regarding the Lanham Act’s tarnishment provision. While historical evidence of trademark protection against tarnishing uses might support constitutionality, courts must weigh this against concerns about viewpoint-based restrictions. The empirical basis for dilution and tarnishment claims may also trigger judicial skepticism, as research shows mixed evidence for these phenomena.

Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law
“Incentives and Music Composition”

For centuries, a simple story has justified copyright: More copyright yields more revenue for copyright owners, and more revenue for copyright owners yields more creative works for society. The rise of file-sharing and the subsequent collapse in sales of recorded music has given us a natural experiment to test whether there is any truth to the story of copyright, at least for the production of popular music.

In previous work, I have shown that the story did not hold for the sound recording copyright. Over the last sixty years, where a statistically significant correlation was found between revenue and the quality and quantity of recorded music, the correlation was negative. More revenue to the industry meant less and worse hit songs for society. In this article, I extend that work to the musical work copyright and examine the relationship, if any, between revenue and the output of popular music composition. In particular, I seek to answer three questions. First, did more money for popular musical composition yield more and better popular musical compositions? Second, were increased incentives associated with more entry by new composers into the market for hit songs? Third, were increased incentives associated with higher productivity from the top composers?

In the first ever empirical study of these three questions, I show that the answer to each of these questions is no, at least for the U.S. music industry over the last six decades. More revenue and increased incentives for hit songwriters was not associated with: (i) more or better hit songs; (ii) greater entry by new hit songwriters; or (iii) increased productivity from the top composers.

Prof. Michael D. Murray, J. David Rosenberg College of Law, University of Kentucky
“Deceptive Exploitation: Deepfakes, the Rights of Publicity and Privacy, and Trademark Law”

This article addresses the intersection of deepfake technology and the law within three key legal frameworks: the right of publicity, the right of privacy, and trademark law. The development of visual generative artificial intelligence (GAI) tools, particularly generative adversarial networks and diffusion-based transformer models, has revolutionized and democratized how visual and audio content is produced. One result of this democratization is that deepfakes—artificially generated audio, video, and images that convincingly mimic real people—are proliferating. The ubiquitous nature of the technology presents challenges in keeping up with deepfakes that are used to exploit a person’s name, image, likeness, or persona without their consent. But the existing triad of publicity, privacy, and trademark law is adaptable and capable of addressing the evolving legal issues posed by this emerging technology.

Publicity law, as applied to deepfakes, offers protections against unauthorized commercial exploitation, particularly when deepfakes are used in advertising or endorsements. Key precedents, such as *Midler v. Ford* and *Carson v. Here’s Johnny Portable Toilets*, are reviewed, illustrating how courts have recognized the right to prevent the commercial use of an individual’s identity. This framework is well-suited to combat the rise of deepfake technology in commercial contexts where AI-generated content exploits a person’s identity for monetary gain.

Privacy law is particularly relevant in cases where deepfakes invade an individual’s private life or cause emotional harm. Deepfakes may trigger claims of invasion of privacy, public disclosure of private facts, and false light misrepresentation. Deepfakes that portray individuals in damaging or

compromising ways without consent, such as in revenge porn or defamation scenarios, fall squarely within privacy law protections. The adaptability of this legal framework is highlighted, especially in non-commercial contexts where the right of publicity may not apply. However, limitations imposed by the First Amendment are also discussed, which may shield some deepfakes if they are used for expressive purposes, such as artistic expression, parody, or satire.

Trademark law false endorsement and false designation of origin claims under the Lanham Act aim to prevent consumer confusion regarding the affiliation, sponsorship, or approval of goods or services. Deepfake technology is increasingly used to create false endorsements, where AI-generated images or videos depict public figures endorsing products they have no connection to. Trademark law provides robust protections against such misrepresentations, safeguarding both consumers and the individual whose likeness is exploited. Notable examples of false endorsement claims, such as *Hoffman v. Capital Cities/ABC, Inc.* and *Abdul-Jabbar v. General Motors Corp.*, are discussed, illustrating how trademark law can combat the deceptive use of deepfakes in commercial contexts.

Throughout the article, the role of the First Amendment is critically examined. While commercial speech, such as advertising, enjoys less protection, deepfakes used for expressive purposes—such as artistic expression, commentary, parody, or criticism—may invoke First Amendment defenses. Courts balance these constitutional protections against privacy, publicity, and trademark claims.

Ultimately, the article concludes that, although deepfakes represent a novel challenge, the existing triad of publicity, privacy, and trademark law is adaptable and capable of addressing the evolving legal issues posed by this emerging technology.

Prof. Alina Ng Boyte, William S. Richardson School of Law, University of Hawaii
“Indigenous Knowledge and Sustainable Food Systems”

This paper explores the value of Indigenous and traditional knowledge to sustainable food systems and the critical link between biodiversity and sustainable agricultural development, which supports global food security. As our current food production systems are one of the most significant contributors to the triple planetary crisis—climate change, pollution, and biodiversity loss—there is a need to find alternative systems capable of sustaining humanity’s need for food. Indigenous, local, and traditional knowledge about food production systems supporting local and regional markets and feeding rural and urban populations is invaluable in moving society towards the second Sustainable Development Goal of “zero hunger” by 2030. After analyzing state responses to granting intellectual property rights, imposing land use restrictions and conditions, abating nuisance claims, recognizing easements, and acknowledging the public trust doctrine, this paper argues that the most valuable state response to protecting Indigenous and traditional knowledge in sustainable food processes is to shape property rights so that private property rights work to support public and social goals.

When evaluating intellectual property rights, including access-benefits arrangements, this paper points out that both these approaches protect private property that, under current conceptions, are not legally structured to protect Indigenous and traditional knowledge, acknowledge the knowledge bearer’s connection with and respect for the land, and ensure their preservation for long term sustainability, all of which are important for creating sustainable food systems at a global

scale. Bioprospecting and commercial exploitation of local and Indigenous knowledge for developing new pharmaceuticals and crop varieties have not resulted in the equitable sharing of economic benefits that encourage the cultivation and sharing of such knowledge. Instead, these commercial activities only highlight the vast power imbalances between wealthy and large corporations seeking new rights and the biodiversity-rich but economically and technologically deprived countries and communities that provided the knowledge and supported these corporations. The benefits of property rights over such knowledge rarely reach the people who are the knowledge holders and guardians of biodiversity and agrobiodiversity. This paper argues that the creation of sustainable food systems will depend on property, including intellectual property, laws prioritizing personhood interests and intrinsic motivations over economic and extrinsic ones.

Dr. Emma Perot, Faculty of Law, University of the West Indies, St. Augustine (Trinidad and Tobago)
“Navigating the Copyright Fact Versus Expression Division While Avoiding Substantial Fictionalization in New York”

Movies and television series based on biographical information tell someone’s life story. Where a work is created based on an earlier fixated story, to avoid infringement of copyright, a producer would have to veer away from protected expression and instead stick to the unprotected facts. But it is usually the way in which the facts are expressed that make a compelling story. Literal and fictional portrayals of persona are often immunized from the right of publicity in California barring any defamation claim, through an exception for expressive works, the transformative use defense, and anti-SLAPP motions. This gives the producer creative freedom so that a copyright license may be rendered unnecessary. However, in New York, the right of publicity can be deployed against an expressive work if there has been substantial fictionalization. This creates a problem as a producer needs to avoid creating an infringing derivative copyright work which would occur if protected expression were taken, while also avoiding embellishment that might infringe the right of publicity.

This article makes two arguments. Firstly, it is difficult to draw the line between fact and expression where a life story is fixated. The impact of this has been the introduction of life story protection through the back door of copyright. Consequentially, a copyright holder can gatekeep someone else’s life story, the implications of which have been discussed by Timothy McFarlin and others. Secondly, the New York substantial fictionalization test should be overruled as it provides an additional challenge to the already difficult task of being on the right side of the fact versus expression division. The standard for the substantial fictionalization test is lower than the actual malice standard for defamation. Defamation is more suitable for protecting the reputation of the individual portrayed. The implication of the substantial fictionalization approach is that where a person is the author of an autobiography, copyright and the right of publicity can coincide. This collision puts additional pressure on securing permission from the individual for the portrayal and can have a chilling effect on freedom of speech.

Prof. Zvi Rosen, Southern Illinois University School of Law
“AI and Its Antecedents at the Frontiers of Authorship”

The idea of computers creating works which might be copyrightable (be it called AI, computational creativity, algorithmic authorship, or anything else) is older than we tend to think, as are attempts to register such works for copyright. This project looks back at the history of registering computer-

generated works along with a number of other ideas about authorship which push the meanings of “authorship” in different directions and proposes some lessons we can learn.

In the mid-1950s, experiments in authoring music by computer began, followed graphical works and compilations by the mid-1960s. Repeated attempts to register these works led to a 1965 policy statement from the Copyright Office that “[t]he crucial question is whether the work is one of human authorship with the computer merely being the instrument, or whether the creation is conceived and executed not by man but by a machine.” This position remains the position of the Office, and is quoted in the Office’s 2023 Policy Statement on works containing AI-generated material.

I have tracked down what I believe to be the works in question and other works where copyright registration was attempted for an AI work. In addition, although some precedents like *Burrow-Giles*/photographs and animal authorship are well-known, I also trace the nearly parallel issue of the registration of aleatory music—music where the expression is intentionally indeterminate. Barely explored in the literature, I believe the historical record which exists on this issue offers us a solution and insight.

In addition to practical solution, I believe that exploring the history of copyright registration of AI works also offers us insight into what exactly the purpose and nature of copyright is, with the focus on human authorship not merely being a legal requirement but central to copyright itself.

Prof. Francisco Tschen ‘03 ‘05, Florida International University College of Law

“The Role of Rule 55 in Foreign Priority: Assessing Its Impact in Preserving Foreign Priority Rights in the U.S.”

This paper investigates the complexities of foreign priority in U.S. patent law, examining the intersection of international agreements and national statutes that aim to preserve inventors’ priority rights across jurisdictions. The paper begins with the Paris Convention of 1883, which established the foundational “right of priority,” enabling inventors to secure an initial filing date that can be recognized internationally. In the United States, this principle is implemented through 35 U.S.C. § 119, allowing applicants to claim the filing date of an earlier foreign application, provided the U.S. application is filed within a specified period. However, despite this statutory framework, inventors often face procedural challenges, particularly with unintentional delays that can jeopardize their priority claims. To address these issues, 37 CFR § 1.55 (Rule 55) offers a pathway for applicants to petition for restoration of priority rights if they can demonstrate the delay was unintentional. Through an analysis of USPTO administrative practices and key cases, this paper evaluates the effectiveness of Rule 55 in safeguarding priority rights.

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

“Bridging the Global Artificial Intelligence Divide”

In the past few years, China, the European Union, and the United States have actively engaged in a race to develop artificial intelligence (AI). A few other nations have since joined the fray. Meanwhile, many countries in the developing and least developed worlds have been left behind, due largely to their lack of economic resources, computing power and equipment, technological expertise, and an AI talent pool. As the U.N. Secretary-General’s AI Advisory Body recently states in its final report: “Left ungoverned, ... AI’s opportunities may not manifest or be distributed

equitably. Widening digital divides could limit the benefits of AI to a handful of States, companies and individuals. Missed uses—failing to take advantage of and share AI-related benefits because of lack of trust or missing enablers such as capacity gaps and ineffective governance—could limit the opportunity envelope.” Written for a forthcoming edited volume entitled *Inclusive Innovation in the Age of AI and Big Data*, this chapter examines, at the macro level, the global AI divide—the proverbial gap between those who have access to, or proficiency in, AI-driven technological products and services and those who do not. The chapter then identifies policy tools that could be introduced to help bridge this divide.