



2017 Texas A&M Intellectual Property Scholars Roundtable

FINAL PROGRAM

FRIDAY, OCTOBER 13, 2017

8:30 Breakfast

9:15 Welcoming Remarks

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

9:30 Panel 1: Trademark Law

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

Presenters: Suneal Bedi, Wharton School, University of Pennsylvania
“Bad Brands—Experimental Studies in Trademark Tarnishment”

Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law
“Trademark’s De-Evolution”

10:45 Coffee Break

11:15 Panel 2: International Intellectual Property Law

Moderator: Prof. Saurabh Vishnubhakat, Texas A&M University School of Law

Presenters: Prof. Daniel C.K. Chow, Michael E. Moritz College of Law, Ohio State University
“Three Major Problems Confronting Multinational Pharmaceutical Companies Doing Business in China”

Prof. Stefania Fusco, Notre Dame Law School
“Lessons from the Venetian Republic’s Tailoring of Patent Protection to the Characteristics of the Invention”

Prof. Liam S. O’Melinn, Pettit College of Law, Ohio Northern University
“Intellectual Property and National Security”

Prof. V.K. Unni, Indian Institute of Management Calcutta (India)
“India’s Tryst with TRIPS: Evidence and Experience from the First Decade”

1:00 Lunch

2:00 Panel 3: Intellectual Property Law I

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

Presenters: Prof. Eric E. Johnson, University of North Dakota School of Law
“Economic Value in Federal Trade Secrets”

Prof. Zvi S. Rosen, George Washington University Law School
“An Empirical Study of 225 Years of American Copyright Registrations”

Prof. Saurabh Vishnubhakat, Texas A&M University School of Law
“Commingled Powers in the Patent Office”

3:30 Coffee Break

4:00 Panel 4: Copyright Law I

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

Presenters: Prof. Pascale Chapdelaine, Faculty of Law, University of Windsor (Canada)
“Graffiti, Street Art, and the Purpose of Copyright Law”

Prof. Timothy J. McFarlin, University of La Verne College of Law
“Pirate Art: Fair Use and The Who Sell Out”

Dr. Kylie Pappalardo, Faculty of Law, Queensland University of Technology (Australia)
“Australian Creators, Reuse and Copyright Restrictions: An Empirical Study”

5:30 Roundtable Adjourns for the Day

7:00 Dinner for Roundtable Participants

Reata
The 35th Room
310 Houston St., Fort Worth

SATURDAY, OCTOBER 14, 2017

9:00 Breakfast

9:30 Panel 5: Copyright Law II

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

Presenters: Prof. Thomas C. Folsom, Regent University School of Law
“To Open and Enter the Unopenable Room Through the Front Door by Imposition of Post-Secondary Liability for Encryption-Enabled Intellectual Property Offenses”

Cheryl Foong, Curtin Law School (Australia)
“Reflections on the Making Available Right: A Comparative Analysis of US, Australian and EU Approaches”

Joanne Gray, Thomas More Law School, Australian Catholic University (Australia)
“Governed by Google: Private Copyright Rule-Making and Algorithmic Enforcement”

11:00 Coffee Break

11:30 Panel 6: Patent Law I

Moderator: Prof. Srividhya Ragavan, Texas A&M University School of Law

Presenters: Prof. Sarah Burstein, University of Oklahoma College of Law
“The ‘Article of Manufacture’ Today”

Prof. Tabrez Y. Ebrahim, California Western School of Law
“*In Silico* Experimentation”

Prof. Joshua Sarnoff, DePaul University College of Law
“How Do We Assess Doctrinal Progress?”

1:00 Lunch

2:00 Panel 7: Patent Law II

Moderator: Prof. Saurabh Vishnubhakat, Texas A&M University School of Law

Presenters: Prof. Andrew C. Michaels, George Washington University Law School
“Patent Transfer and the Bundle of Rights”

Prof. Srividhya Ragavan, Texas A&M University School of Law
“Data Exclusivity: A Global Perspective”

Prof. W. Michael Schuster, Oklahoma State University Spears School of Business
“A Coasean Analysis of Ownership of Patents for Inventions Created by Artificial Intelligence”

3:30 Coffee Break

4:00 Panel 8: Intellectual Property Law II

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

Presenters: Prof. John T. Cross, Louis D. Brandeis School of Law, University of Louisville
“A Framework for a Workable Moral Rights System”

Prof. Mary LaFrance, William S. Boyd School of Law, University of Nevada, Las Vegas
“The Right of Publicity and Choice of Law”

Prof. Doris Estelle Long, John Marshall Law School, Chicago
“Broadening the Normative Inputs for 21st Century Copyright Reform in the United States: Isn’t It Time to Add Privacy into the Mix?”

Professor J. Janewa OseiTutu, Florida International University College of Law
“‘Socially Responsible’ Corporate IP”

5:45 Closing Remarks

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

6:00 Roundtable Adjourns for the Day

7:00 Dinner for Roundtable Participants

The City Club of Fort Worth
The Library Room
301 Commerce Street, Fort Worth

Commentators

- Prof. Gao Lanying, Guilin University of Electronic Technology (China)
- Prof. Shubha Ghosh, Syracuse University College of Law
- Prof. H. Brian Holland, Texas A&M University School of Law
- Prof. Marshall Leaffer, Indiana University Maurer School of Law
- Prof. Shao Yan, Law school, Anhui University of Finance and Economics (China)
- Prof. Jeff W. Slattery, Texas A&M University School of Law
- Prof. Wang Zican, Law School, South China University of Technology (China)
- Prof. Peter K. Yu, Texas A&M University School of Law

ABSTRACTS

Suneal Bedi, Wharton School, University of Pennsylvania

“Bad Brands—Experimental Studies in Trademark Tarnishment”

Does having your mark associated with sex harm the reputation of your brand? What about disgusting or low quality products? Yes! is the underlying assumption of trademark tarnishment. This assumption however, is empirical by its very nature. In this paper we test this underlying assumption using experimental methodologically. And in doing so show that trademark tarnishment does exist and does have significant financial effects on a brand. We then articulate the conditions under which tarnishment occurs and provide recommendations for courts and Congress on what kinds of proof and experimental studies should be used in court proceedings.

Prof. Sarah Burstein, University of Oklahoma College of Law

“The ‘Article of Manufacture’ Today”

In *Samsung v. Apple*, the U.S. Supreme Court ruled that the phrase “article of manufacture” in 35 U.S.C. § 289 of the Patent Act can refer either to the infringer’s end product or to a component thereof. But the Court refused to formulate a test for what constitutes the relevant “article” in a given case. Some argue that courts should adopt the multi-factor, case-specific approach proposed by the U.S. Government in its *Samsung* amicus brief. However, that approach is based on a flawed legal premise, fails to reflect either the language of the statute or the original intent, and will increase costs and uncertainty in design patent litigation. This Article proposes a new solution. It argues that courts should adopt the historical meaning of the phrase “article of manufacture” in interpreting and applying 35 U.S.C. § 289. It also argues that the determination of which article a particular design is “applied” to should be informed by the original understanding of what constituted a protectable “design.” This Article then proposes a framework for applying these principles to *Samsung* step one, including an explanation of why this should be treated as an issue of law, not an issue of fact. This approach provides a workable solution that would be easier and cheaper to apply than the other proposed tests. This approach would also minimize the *in terrorem* value of partial design patents and result in more defensible damages awards that would better reflect the designer’s actual contribution without providing too much of a windfall to most design patentees.

Prof. Pascale Chapdelaine, Faculty of Law, University of Windsor (Canada)

“Graffiti, Street Art, and the Purpose of Copyright Law”

This interdisciplinary research project (anthropology, sociology and law) is a continuation of my previous work exploring the mediation between various competing interests in an art work: i.e. the interests of the artist, art collective, the owner of the copy of the work, and the public. The specific contextual issues raised by graffiti and street art offer a great opportunity to further our understanding of what copyright should protect and why. Those issues involve the very purpose of these works coming into being as public acts, the significance of acts of illegality and transgression, thresholds of originality, the scope of protection that copyright and moral rights should confer on graffiti and street art, if any, the scope of property rights in the graffiti or street art work and in the copy of the work (i.e. of the building property owner on which the work was done), which includes the extent to which the public should be authorized to use and commercialize copies of those works. The dialogue with the public that graffiti and street art create and the extent to which this should influence how copyright and moral rights apply is one among several distinct features of graffiti and street art that I will explore.

Prof. Daniel C.K. Chow, Michael E. Moritz College of Law, Ohio State University

“Three Major Problems Confronting Multinational Pharmaceutical Companies Doing Business in China”

Multinational Companies (MNCs) in the pharmaceutical industry today face formidable challenges in China, the world’s second largest pharmaceutical market after the U.S. Not only is China the world’s largest source of counterfeit and substandard drugs, Chinese authorities have also recently targeted MNCs as part of a crackdown on bribery and competition law violations. In addition, China has a number of technology transfer laws that seem designed to force MNCs to provide uncompensated access to their proprietary technology protected by patents and trade secrets. All of these problems can be traceable to China’s rising nationalism and protectionism in its dealings with foreign companies and nations in international business and trade. These are daunting problems but while MNCs focus their efforts on short-term technical solutions, only a long-term approach focusing on legal and political reform can provide a lasting solution.

Prof. John T. Cross, Louis D. Brandeis School of Law, University of Louisville

“A Framework for a Workable Moral Rights System”

Much of the debate in intellectual property law deals with whether a “one size fits all” approach makes sense. That same issue arises in connection with the moral rights. The Berne Convention’s Article 6*bis* duty to provide moral rights applies on its face to all copyright works. It also requires the same two moral rights in all cases. This one size fits all approach has generated some of the difficult questions that arise in the moral rights realm, such as how moral rights apply to public art and the extent to which moral rights exist in graffiti.

The thesis of this article is that treating all works and authors equally undermines the practical effectiveness of a moral rights system. Instead, a workable moral rights system needs to take account of very real differences between various categories of works. For example, the distinction between works sold as “originals” and those sold in “copies” (a distinction that exists in the U.S. Visual Artists Rights Act) directly affects how moral rights should apply. A workable moral rights regime would also recognize that there are multiple policy rationales for moral rights; rationales that in some cases contradict each other. The article points out the major categories of works, and how the differences between those categories should affect the analysis.

Prof. Tabrez Y. Ebrahim, California Western School of Law

“*In Silico* Experimentation”

Does an *in-silico* invention meet enablement in U.S. patent law? Can computational research tools allow a person having ordinary skill in the art (PHOSITA) to make and use a claimed invention without undue experimentation? Advances in computational techniques, such as molecular dynamics simulations, and in parallel computing enable digital experimentation of biological, chemical, and physical properties. Enablement problems arise when an inventor claims a hypothetical genus or predicts material science properties without support. USPTO patent examination, which is not suited to detect and examine computationally-derived inventions, conflates the enablement problem of *in-silico* inventions. Patent examiners are assigned to art units based on their scientific or technological background and are unskilled in identifying and examining prophetic patent claims. To address the shortcomings of the current examination framework for *in-silico* inventions, the USPTO should (1) employ examiners trained in computational sciences/engineering and (2) develop computational enablement clarity and guidance for office actions. First, USPTO patent examiner hiring norms, which are based on traditional science and engineering disciplines, should include computational degree programs as qualifications in hiring announcements for art units comprising unpredictable technologies. Second, similar to recent patent eligibility guidance, the USPTO should seek comments from the computational research community and

implement office action training on examination of *in-silico* inventions. Amplified 35 U.S.C. § 112 examination may lead computational inventors to seek trade secret protection, but would thwart the chilling effect of *in-silico* inventions for high-growth potential, unpredictable technologies.

Prof. Thomas C. Folsom, Regent University School of Law

“To Open and Enter the Unopenable Room Through the Front Door by Imposition of Post-Secondary Liability for Encryption-Enabled Intellectual Property Offenses”

I suggest that we conceptualize strong encryption in cyberspace as the creation of an unopenable room; and that we view anonymization and other masking techniques and tools to prevent detection or to prevent attribution in an analogous way. Outside of cyberspace, it would seem that no such impregnable lair and no such perfect masks could be easily constructed, nor that (if they could exist) any sovereign state would permit them to stand for long. And yet coded constructs in cyberspace readily permit such exploits, sometimes by offending actors against trademark and copyright interests who are hard to find, hard to subject to relevant jurisdiction, hard to connect by forensic evidence to the offense, and hard to stop. These offending actors make use of ubiquitous tools that are rather common in cyberspace. The “whack-a-mole” nature of the problem makes the enforcement enterprise, if aimed against the individual offenders, yet more futile.

But there are providers who make the tools, techniques, goods, and services available, thereby materially contributing to the offenses of those actors. We may acknowledge that strong encryption is necessary for lawful purchases and sales, banking, and other legitimate transactions, or simply to preserve privacy. Therefore it follows that there are substantial non-offending uses of the strong encryption and related goods and services offered by providers to persons, some of whom might themselves offend against the rights of copyright or trademark proprietors. As a result, it is unlikely that a provider of such encrypting or masking goods or services risks contributory-style secondary liability, unless the provider were on actual or constructive notice *ex ante* (and it might be a rare case where that occurs).

I propose an *ex post* requirement of reasonable technological cooperation by a provider, after the provider is notified of an offending exploit committed by a primary offending actor who was cloaked or otherwise shielded by tools of the provider. That is, a provider who: (a) is given adequate grounds to believe that an offending exploit has already occurred with the material aid of strong encryption or masking tools made available by the provider (b) must take reasonable technological steps to assist in identification and remediation, or else face what I will call *post-secondary liability*.

As a result of a post-secondary liability regime, some providers would be required to take reasonable steps to design “front door” access to otherwise strong encryption, to prohibit identity-masking (or to enable front-door unmasking), and otherwise to aid in creating a more trustworthy cyber environment in which attribution and tracing may become more secure.

I maintain that this proposal will help advance a reasonable and restrained *anti-privacy interest* in cyberspace to restore (or create) reasonable expectations of fair dealing in respect of copyright and trademark in cyberspace. As an added advantage, this proposal might well be extended to law enforcement outside of intellectual property—rather than rely upon subpoenas and the like, perhaps the realistic imposition of post-secondary liability might result in a more balanced way to prevent waste, spoliation, and dangerous activities without the need for more heavy-handed policing that might otherwise be expected.

Cheryl Foong, Curtin Law School (Australia)

“Reflections on the Making Available Right: A Comparative Analysis of US, Australian and EU Approaches”

This presentation analyzes the making available right as introduced by the WIPO Internet Treaties and evaluates current judicial approaches to the right in Australia, the US and the EU. It discusses the underlying justifications driving the disparate decisions on the right, and reveals the pitfalls of existing approaches. Distilling lessons from current approaches, this presentation proposes principles for the interpretation of the making available right. These principles are aimed at aligning the development of the making available right with the vast communications potential afforded by the Internet.

Prof. Stefania Fusco, Notre Dame Law School

“Lessons from the Venetian Republic’s Tailoring of Patent Protection to the Characteristics of the Invention”

As the rigorous analysis of the original documents from the Venetian State Archives recently revealed, following the enactment of the 1474 Patent Act, the Venetian Senate continued to grant patents based on *customary law*. Consequently, *two* forms of patent protection were present concurrently in Venice between the 15th and the 18th centuries—one customary and one statutory. In this article I present a detailed account of how the Venetian Republic used its *customary patent system* to tailor protection to the characteristics of the invention. The Venetian patent system represents a successful story in patent history. As a result of its patent system, Venice became the center of technological development in 16th century Europe. Thus, the Venetian customary patent system is an important example of how we might provide tailored patent protection today. The accurate description of this system is crucial to further understanding the specific steps we would need to take to achieve this goal.

Joanne Gray, Thomas More Law School, Australian Catholic University (Australia)

“Governed by Google: Private Copyright Rule-Making and Algorithmic Enforcement”

Over the past decade, Google has developed a range of policies and technological tools used to deter copyright infringement, enforce copyrights and remunerate rightsholders. While these activities are informed by the law, across its platforms Google has created an elaborate system of private copyright rule-making and enforcement. What values and principles are embedded within this system? In whose interest does it operate? In this paper, I argue Google’s system of copyright enforcement is structured in favor of rightsholders, at the expense of public rights and values. I posit it is structured this way because it was developed through private negotiations between Google and powerful rightsholders. Powerful private actors have negotiated copyright agreements, for mutual benefit, and Google uses technological tools to impose the terms of these agreements upon its users. When private companies negotiate and enforce copyright rules that determine the scope and application of copyright across large portions of the digital environment, do they have a responsibility to act in the public interest? I argue that they in fact bear a responsibility to act in the public interest, and I enumerate some strategies to ensure copyright regimes operate in the interest of a broad range of stakeholders.

Prof. Eric E. Johnson, University of North Dakota School of Law

“Economic Value in Federal Trade Secrets”

The federal Defend Trade Secrets Act of 2016 (DTSA), in creating a new federal civil cause of action for trade secret misappropriation, is one of the most important changes to American intellectual property law in decades. Much attention has been focused on the DTSA’s procedural aspects, particularly its provision for *ex parte* seizures. This paper, however, concentrates on the DTSA’s substantive side, namely what the DTSA requires in terms of subject matter for a valid trade secret. With phrasing descending from the

Uniform Trade Secrets Act, the DTSA requires that a trade secret have “independent economic value.” In this paper, I explore the concept of economic value in the context of the DTSA and attempt to offer an articulation of the requirement that is clear, straightforward to apply, consistent with broadly held expectations about trade secrets, and that is economically and doctrinally sound. The essence of my argument is that, in the context of the DTSA, “independent economic value” must be understood to mean economic value that is transferrable from one firm to another in a functionally invariant way. Stated differently, a competitor could make commercial use of a valid trade secret in the same way that the trade secret’s original owner could. This conceptualization, for instance, distinguishes a secret recipe (a true trade secret) from confidential internal financial information about a company’s cash reserves (not a true trade secret). The recipe could be used commercially by a competing firm in the same way and for the same ends as by the original firm. But internal financial information would be used by a competitor in a different way (e.g., identifying a competitor’s weaknesses to take advantage of them) than it would be used by the original company (e.g., identifying the firm’s own weaknesses in order to shore them up).

Prof. Mary LaFrance, William S. Boyd School of Law, University of Nevada, Las Vegas
“The Right of Publicity and Choice of Law”

Because of wide variation in the substantive laws regarding the right of publicity both within the U.S. and among different countries, choice of law can be outcome-determinative in suits where the unauthorized exploitation involves the persona of an individual domiciled in a different jurisdiction. State statutes and U.S. court opinions have taken different approaches to resolving these conflicts. Where the existence of a protectable right is at issue (as in suits asserting a postmortem right), the majority of U.S. courts that have considered the question have applied the law of the domicile. One state statute expressly denies protection for nondomiciliaries, living or dead. One court even suggested that the domicile rule is constitutionally required. Only two states have expressly rejected the domicile rule. This paper explains why the domicile rule is wrong.

Prof. Doris Estelle Long, John Marshall Law School, Chicago

“Broadening the Normative Inputs for 21st Century Copyright Reform in the United States: Isn’t It Time to Add Privacy into the Mix?”

From the heightened surveillance possibilities of drone photography, bot searches and filtering technologies, to the rapid unauthorized dissemination of personal information through the digital posting of leaked documents and personal sexting images that often qualify as copyright protectable works, privacy protection has become inextricably linked with US copyright law. We have already seen its consideration in battles over the appropriateness of blocking injunctions, filtering technologies and bot searches in the enforcement of copyrights in the digital environment. It is time to broaden the impact of privacy on US copyright norms by considering its impact on a broader array of issues, including the boundaries of authorial control, the scope of fair use/fair dealing limitations, and the effectiveness of presently discredited enforcement methodologies, including most significantly the present notice and takedown regime of the DMCA (NTD).

A revised copyright regime that incorporates end user privacy issues as one of its normative inputs create a viable NTD process that meets the concerns of authors, distributors and end users in a more balanced manner. Similarly, distributional control over works that raise concerns regarding personal privacy may be altered to strike a more nuanced balance in valuing the concerns of end users and content owners.

It is too soon to predict what balances will be struck under the new norms that arise from this process. But if we do not consider privacy issues now, we could end up with a reformation of copyright that will be as empty as of the modifications enacted in the 1990s when end users’ concerns were largely excluded.

Adding privacy concerns to copyright reformation considerations will not simplify the process. But it may provide a normative basis that will survive the next technological revolution.

Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law
“Trademark’s De-Evolution”

Once upon a time, trademark law served the interests of consumers. No more. Today, trademark law serves the interests of trademark owners. Somewhat surprisingly, courts, and not Congress, are to blame for trademark’s evolution from efficient market regulator to inefficient rent protector. Despite some early law and economic scholars’ attempts to tout the supposed efficiency of common law evolution, in trademark law, that evolution has gone badly awry. Courts have gotten trademark cases, and as a result trademark law, wrong, not just occasionally, but systematically.

In this article, I focus on the role party self-interest has played in biasing the evolution of trademark law. Simply put, parties chose to litigate when it is in their self-interest to do so. In trademark law, this self-interest tends to lead parties, first, to challenge efficient legal rules, seeking them to replace them with inefficient, anticompetitive rules, and then, second, once an inefficient, anticompetitive rule is in place, to accede to it. Almost by definition, when a rule of trademark law promotes competition, it reduces the market surplus or rents producers capture. As a result, parties will seldom find it worthwhile to spend resources either to defend an efficient trademark rule or to challenge an inefficient trademark rule in the hope of replacing it with a more efficient rule. In contrast, inefficient trademark rules offer, again almost by definition, a party, usually the trademark owner, the opportunity to capture rents. As a result, at least one party will have a correspondingly strong interest in defending such inefficient trademark rules or, if necessary, challenging efficient trademark rules in the hope of replacing them with inefficient trademark rules. The net result has been something of a perfect storm for trademark law. Efficient legal rules are repeatedly challenged until they are replaced with inefficient legal rules, at which point no one challenges them. The entirely predictable result of this process is exactly what we have observed: Courts have re-written trademark law so that it protects far too much and far too broadly. Rather than ensure competition, it serves instead to restrict competition and to maximize the profits of trademark owners. Rather than promote consumer welfare, it has become a form of corporate welfare.

We cannot fix the problems with trademark law through substantive trademark doctrine, however. Substantive reform, even radical substantive reform, would simply provide a new starting point from which inefficient common law evolution would, once again, proceed. To fix the ongoing de-evolution of trademark law, we need to change the process of trademark litigation to ensure, first, that parties have an adequate incentive to defend and fight for efficient legal rules, and second, that courts have the information they need to recognize the efficient legal rule and render judgment accordingly. In this paper, I identify and evaluate several possible mechanisms for solving trademark’s ongoing, common law de-evolution.

Prof. Timothy J. McFarlin, University of La Verne College of Law
“Pirate Art: Fair Use and The Who Sell Out”

The seminal rock group the Who styled their 1967 album *The Who Sell Out* as a broadcast from a “pirate” radio ship. Until earlier that year, when the British government banned them, the pirates had been broadcasting outside of British law, in international waters, providing British teenagers their only unfettered access to the sounds of American rock and roll.

In order to simulate a broadcast from one of these pirates, the Who interspersed without permission a number of authentic pirate radio jingles among their own original songs. These jingles were created by the U.S.-based company PAMS, Inc., which had licensed them to the pirates but retained ownership of

the copyrights. PAMS threatened to sue the Who, and the parties settled, permitting *The Who Sell Out's* continued distribution.

But the Who also risked running afoul of trademark law by incorporating names and logos of real brands advertised on pirate radio. Odorono deodorant and Heinz Baked Beans, for instance, both figured prominently in *The Who Sell Out's* songs and cover art, symbolizing the hyper-consumerism which permeated the pirate airwaves.

This Article explores what lessons we can take from *The Who Sell Out* for fair use in copyright and trademark law. For example, *The Who Sell Out* challenges the orthodox categories courts have traditionally applied in the transformative use determination. Was *The Who Sell Out* a parody of pirate radio stations, an homage to them, a parody of the brands advertised on the stations, a satire of consumerism, a protest against the British government for shutting down the pirates, some of these, all of these? If we can't say for sure, to what extent does this suggest forever banishing these categories from copyright and trademark?

In this and other ways, the story of the concept album *The Who Sell Out* may provide new insights and illustrations as to how we might best calibrate fair use in copyright and trademark.

Prof. Andrew C. Michaels, George Washington University Law School
“Patent Transfer and the Bundle of Rights”

When patents subject to a license agreement are transferred, to what extent do the benefits and burdens of the license agreement run with the patent? Courts have stated that those aspects of the agreement relating to “actual use” of the patent or invention are encumbrances running with the transferred patent. But this doctrinal test is not consistently applied and is not up to the task of clearly and consistently delineating the extent to which patent license agreements run with transferred patents. The question is one of separating an *in personam* license agreement from the agreement's effects on underlying *in rem* intellectual property rights.

Conceptualizing the patent as a bundle of Hohfeldian Rights to exclude, this article proposes a more coherent framework for analyzing the extent to which actions by a prior patent owner run with a transferred patent to affect the rights of subsequent owners. The patent owner, through a license agreement or other actions such as selling a patented article, may exchange sticks in the bundle for other forms of value, thus diminishing the size of the *in rem* bundle of rights. When a patent is transferred, what is transferred is whatever remains in the *in rem* patent bundle, while the *in personam* contract remains between the two signatories. The broader contribution of this article is in exploring how Hohfeld's platform can usefully aid in the analysis of complex doctrinal issues in patent law, particularly issues that arise from the transfer of patents.

Prof. Liam S. O'Melinn, Pettit College of Law, Ohio Northern University
“Intellectual Property and National Security”

This paper is intended to investigate the connection between common attitudes toward intellectual property and problems of national security. The paper is at an early stage of development, and proceeds from the recent controversy over Russian involvement in the last American presidential election. The general hypothesis is that an undue respect for intellectual property is part of a much broader cultural phenomenon involving the placement of trust in the wrong places. A society whose members believe that the use of their digital devices is appropriately limited to pointing and clicking is a society likely to be complacent in the face of the threat of cyber-attacks. This complacency has been evident not only in events leading up to the election, but in events that have taken place since then, and perhaps most

importantly, in critical assessments of the significance of these events. This paper is intended as a commentary on those events and assessments.

Professor J. Janewa OseiTutu, Florida International University College of Law
“‘Socially Responsible’ Corporate IP”

Many companies practice corporate social responsibility (CSR) as part of their company branding and public relations efforts. They adopt voluntary codes of conduct, thereby appearing to engage in good business practices and respecting human rights. In theory, patent and copyright laws promote progress and innovation. Trademark rights encourage businesses to maintain certain standards and allow consumers to make efficient choices. Does this make intellectual property inherently, “socially responsible”? If not, can modern CSR principles be adapted to the intellectual property system to promote intellectual property rights that better promote human flourishing?

Dr. Kylie Pappalardo, Faculty of Law, Queensland University of Technology (Australia)
“Australian Creators, Reuse and Copyright Restrictions: An Empirical Study”

This paper presents the initial findings from a study of how Australian creators experience copyright law. The study involves a series of qualitative interviews with Australian creators (incl. filmmakers, musicians, writers and visual artists) about their creative practices, focusing particularly on reuse and licensing practices. I draw out the themes that have emerged from the data around practices of attribution, permission-seeking and demonstrations of ‘respect’ between creators; how creators assess and manage risk; and what creators think about the copyright system. This study is part of a broader research project that aims to work closely with creators and professional groups to illuminate and demystify the applied experience of contemporary copyright practice.

The political climate around copyright law in Australia is currently highly polarized. Following recommendations from several law reform committees that Australia adopt fair use, publishers and other large intermediaries have been waging a war against policymakers, academics and anyone who publicly supports broader reuse exceptions in Australia. My study seeks to contribute empirical data about how creators work within and around the law, to inform these ongoing policy debates and to ensure that the development of copyright law is properly tailored to fostering creativity.

Prof. Srividhya Ragavan, Texas A&M University School of Law
“Data Exclusivity: A Global Perspective”

The presentation will outline the impetus for pharmaceutical companies to push for a more stringent data exclusivity regime internationally. In doing so, it examines the prescription of the trade regime and the outstanding questions in this area, especially from the perspective of poorer nations.

Prof. Zvi S. Rosen, George Washington University Law School
“An Empirical Study of 225 Years of American Copyright Registrations”

This project provides the first comprehensive empirical view of copyright registrations and renewals through what is essentially the totality of American history, from 1790 through 2015. Relying on a novel dataset of registration information from the Catalog of Copyright Entries for 1903–1977, renewal data for 1909–2005, and earlier registration and renewal data from a variety of sources, we engage longstanding questions about the effectiveness of copyright law and the effects of statutory, economic, and technological changes on the maintenance of federal copyrights.

Prof. Joshua Sarnoff, DePaul University College of Law
“How Do We Assess Doctrinal Progress?”

We often refer to the goal of “progress” in regard to intellectual property doctrine, given that the purported object of intellectual property rights (at least of works of inventors and authors, which we normally refer to as patents and copyrights) is framed in terms of a legislative power to “promote the Progress of Science and useful Arts.” Traditional scholarship has focused on progress either as qualitative improvement or on progress as dissemination (particularly of knowledge), or as not imposing any meaningful limit on granted power. This portion of a draft of an article looks at doctrine in terms not of the outputs of intellectual property rights (the state of the world that our intellectual property doctrines create) but rather at the progress of intellectual property doctrine itself.

The draft posits that doctrine should be evaluated by reference to three categories. The first (and by far the most important) is theoretical coherence of doctrine with purposes for doctrine. Resolving those purposes, of course, is the challenge. Assuming that doctrine is coherent, however, then it may be possible for it to also fit the second criterion—clarity of understanding doctrine. With such clarity of doctrine also comes clarity of application of doctrine to particular circumstances. Finally, with clarity of doctrine, it may be possible for doctrine to achieve the third criterion—objectivity of the application of doctrine, and better yet objectivity of the subjects of doctrinal protection.

Examples of how this works will be provided from the long history of patent eligibility doctrine, and judicial efforts (particularly in the United States in the 19th Century) to make patent eligibility doctrine more coherent, clearer, and more objective. In many cases judges did so by “spinning off” subsidiary doctrines that permitted greater clarity and ultimately objectivity of the referents of patent protection (and thus reduced uncertainty and subjectivity in the application of doctrine to determine either subjective intentions of applicants or objective meanings expressed by applicants based on subjective determinations of judges regarding the scope of eligible subject matter that judges thought applicants had claimed and/or to which the thought applicants were entitled).

Prof. W. Michael Schuster, Oklahoma State University Spears School of Business
“A Coasean Analysis of Ownership of Patents for Inventions Created by Artificial Intelligence”

Invention by artificial intelligence (“AI”) is the future of innovation. Unfortunately, the U.S. patent regime has yet to address the issue of how, or whether, it will issue patents for inventions created solely by AI (“AI patents”). This article adds to the scant literature in this field by making two contributions. Initially, the analysis addresses whether Congress has constitutional power to issue AI patents and whether it can be expected to exert this legislative authority. Finding in the affirmative on these issues, the article then utilizes Coase Theorem and its corollaries to determine who should be entitled to AI patent ownership to maximize economic efficiency. Towards this goal, the study concludes that AI patent rights should be allocated to firms that purchase inventing software and use it to create new technologies.

Prof. V.K. Unni, Indian Institute of Management Calcutta (India)
“India’s Tryst with TRIPS: Evidence and Experience from the First Decade”

During the first decade of India’s TRIPS Compliance (2005-15) the country witnessed lot of patent related disputes mostly from the pharmaceutical sector on various issues pertaining to patent protection, enforcement of patent rights and compulsory licensing of granted patents. Even the non-pharmaceutical sector saw an increase in the number of various patent disputes. India while enacting its three amendments had tried to leverage the flexibility provided by the TRIPS Agreement to its member states and to a great extent these amendments have resulted in an increase of patent related disputes. The presentation would focus on the patent disputes which have come up in the last ten years to analyze the

approach of the Indian patent office and other quasi-judicial bodies like the Intellectual Property Appellate Board and the higher judiciary.

Prof. Saurabh Vishnubhakat, Texas A&M University School of Law

“Commingle Powers in the Patent Office”

The USPTO Patent Trial and Appeal Board performs two distinct functions that were delegated to it separately. One is to conduct cases that are accepted for review and resolve them in final written decisions. This is a Congressional delegation of adjudicatory authority to an adjudicatory body. The other, antecedent function is to evaluate petitions and determine which to review at all. This task the AIA does not assign to the PTAB *qua* adjudicator but rather to the USPTO Director. It is the Director who presently delegates the screening function to the PTAB. The details of this latter delegation are significant. Although it is impractical for the Director to evaluate each petition personally, it is not merely the PTAB as a whole that bears the duty to select cases for review. The particular three-judge panel who evaluate a petition and decide to accept it for review, in whole or in part, are the same panel who ultimately decide the case. So the very act of selecting a case—based on its likelihood of success—reflects early intuitions, based on limited arguments and evidence, that may prejudice the panel as the case proceeds. This presents questions of political accountability for at least two reasons. First, the USPTO has repeatedly chosen to enlarge its power over patent validity issues beyond the plain language of the AIA—e.g., authority for partial institutions, denials on “redundant” grounds, and written decisions on fewer than all challenged claims. Second, the USPTO has decided certain cases in an opaque manner—e.g., through panel stacking—rather than a principled one even though the decisions themselves may have been politically defensible. Political decision-making in the guise of adjudication is not only problematic but also, in many cases, unnecessary. Other mechanisms already exist, such as Director-initiated *ex parte* reexamination, for singling out patents that pose politically salient problems and offering reasoned explanations that are backed by the prevailing policy of the executive.