



## 2015 Texas A&M Intellectual Property Scholars Roundtable

### FINAL PROGRAM

FRIDAY, OCTOBER 9, 2015

**8:15**            **Breakfast**

**9:00**            **Welcoming Remarks**

Dean Andrew P. Morriss, Anthony G. Buzbee Dean's Endowed Chair, Texas A&M University School of Law

Prof. Megan M. Carpenter, Co-Director, Center for Law and Intellectual Property, Texas A&M University School of Law

**9:15**            **Panel 1: Patent Law I**

Prof. Jeremy Bock, Cecil C. Humphreys School of Law, University of Memphis  
"Patent Quantity"

Camilla Hrdy, University of Pennsylvania Law School  
"Patent Nationally, Innovate Locally"

Prof. Andrew W. Torrance, University of Kansas School of Law  
"Are Litigated Patents More Important?" (with Jevin D. West)

Prof. Saurabh Vishnubhakat, Texas A&M University School of Law  
"The Antitrust of Patentability"

**11:00**            **Coffee Break**

**11:30**            **Panel 2: International Intellectual Property Law**

Presenters: Prof. Susanna Frederick Fischer, Columbus School of Law, Catholic University of America  
"Learning from the UK's Copyright Hub: A Model for U.S. Copyright Law Reform?"

Prof. Sam Halabi, University of Tulsa College of Law  
"International Intellectual Property Shelters"

Prof. V.K. Unni, Indian Institute of Management Calcutta (India)  
“Indian Judiciary’s Non-FRAND-ly Approach on Standard Essential Patents: The Urgent Need for Reform”

**1:00 Lunch**

**2:00 Panel 3: Patent Law II**

Presenters: Prof. Sarah Burstein, University of Oklahoma College of Law  
“Reviving Ornamentality”

Prof. Stefania Fusco, DePaul University College of Law  
“The Venetian Republic’s Tailoring of Patent Protection to the Characteristics of the Invention”

Prof. Shubha Ghosh, University of Wisconsin Law School  
“Are Universities Special?”

**3:30 Coffee Break**

**3:45 Panel 4: Copyright Law I**

Presenters: Dr. Henry Biggs, Washington University School of Law  
“Moral Rites: Does the Old World Idea Have a Place in the Digital Age?”

Prof. Pascale Chapdelaine, Faculty of Law, University of Windsor (Canada)  
“Digital Locks, Physical Objects and Immaterial Works”

Tim McFarlin, Elon University School of Law  
“An Idea of Authorship: Orson Welles, The War of the Worlds Copyright, and Why We Should Recognize Idea-Contributors as Joint Authors”

Prof. Guy A. Rub, Michael E. Moritz College of Law, Ohio State University  
“Zoom-in Zoom-out of Copyright”

Prof. Eva E. Subotnik, St. John’s University School of Law  
“Artistic Control After Death”

**5:45 Roundtable Adjourns for the Day**

**7:00 Dinner for Roundtable Participants**

Joe T. Garcia’s Mexican Restaurant  
2201 N. Commerce St., Fort Worth, TX 76164

SATURDAY, OCTOBER 10, 2015

**8:15 Breakfast**

**8:45 Panel 5: Patent Law III**

Presenters: Prof. Bernard Chao, Sturm College of Law, University of Denver  
“Testing the Frame in Patent Damages”

Prof. Thomas C. Folsom, University of North Dakota School of Law  
“What to do with Our Broken Patent System”

Prof. David S. Olson, Boston College Law School  
“Abstractness as Proxy for Field Preemption”

Prof. Deepa Varadarajan, J. Mack Robinson College of Business, Georgia State University  
“Possession Problems in Patent and Property Law”

**10:30 Coffee Break**

**10:45 Panel 6: Trademark Law and the Right of Publicity**

Presenters: Prof. Deven R. Desai, Scheller College of Business, Georgia Institute of Technology  
“The Chicago School Trap in Trademark: The Co-evolution of Corporate, Antitrust, and Trademark Law”

Prof. Eric E. Johnson, University of North Dakota School of Law  
“Disentangling the Right of Publicity”

Prof. Jessica M. Kiser, Gonzaga University School of Law  
“Brands as Copyright”

Prof. Glynn S. Lunney, Jr., Texas A&M University School of Law  
“The Right of Publicity and the First Amendment: A Fundamental Re-Examination”

Prof. Irina D. Manta, Maurice A. Deane School of Law, Hofstra University  
“Branded”

Prof. Lisa P. Ramsey, University of San Diego School of Law  
“Trademarking Everything? Why Brands Should Care About Limits on Trademark Rights”

**1:00 Lunch**

**2:00 Panel 7: Copyright Law II**

Presenters: Prof. Tonya M. Evans, Widener University Commonwealth Law School  
“Copyright Reclamation in the Age of Celebrity Loan-Out Corporations and Nonprobate Copyright Transfers”

Dr. Patrick Goold, Chicago-Kent College of Law  
Prof. Oren Bracha, University of Texas School of Law  
“Copyright Accidents”

Prof. Ariel Katz, Faculty of Law, University of Toronto (Canada)  
“Digital Exhaustion”

Dilan Thampapillai, Australian National University College of Law (Australia)  
“A License or a Contract? An Antipodean Perspective on Creative Commons”

Prof. Ari Ezra Waldman, New York Law School  
“Social Networks and Intellectual Property”

**4:00 Coffee Break**

**4:15 Panel 8: Patent Law IV**

Presenters: Prof. Michael P. Goodman, George Washington University School of Law  
“What’s So Special About Patent Law? Devoting Technical—Not Legal—Expertise to Patent Cases”

Prof. William Hubbard, University of Baltimore School of Law  
“Razing the Patent Bar”

Prof. Dmitry Karshedt, George Washington University Law School  
“Photocopies, Patents, and Knowledge Transfer: The Uneasy Case of Justice Breyer’s Patentable Subject Matter Jurisprudence”

Prof. Brian J. Love, Santa Clara University School of Law  
“Patent Litigation in China: Protecting Rights or the Local Economy?”

**6:00 Closing Remarks**

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

**6:15 Roundtable Adjourns for the Day**

**7:00 Dinner for Roundtable Participants**

Bird Café  
155 E. 4th St., Fort Worth, TX 76102

## COMMENTATORS

- Prof. Sydney Beckman, Duncan School of Law, Lincoln Memorial University
- Prof. Megan M. Carpenter, Texas A&M University School of Law
- Prof. H. Brian Holland, Texas A&M University School of Law
- Prof. H. Dennis Kelly, Texas A&M University School of Law
- Prof. Michael Landau, Georgia State University College of Law
- Prof. Yvette Joy Liebesman, Saint Louis University School of Law
- Prof. Jacqueline D. Lipton, University of Akron School of Law
- Prof. Doris E. Long, John Marshall Law School
- Prof. Connie D. Nichols, Baylor Law School
- Prof. Liam S. O'Melinn, Pettit College of Law, Ohio Northern University
- Prof. Srividhya Ragavan, University of Oklahoma College of Law; Texas A&M University School of Law (beginning January 2016)
- Prof. W. Keith Robinson, Dedman School of Law, Southern Methodist University
- Prof. Joshua Sarnoff, DePaul University College of Law
- Prof. Peter K. Yu, Texas A&M University School of Law

## ABSTRACTS

### **Dr. Henry Biggs, Washington University School of Law**

“Moral Rites: Does the Old World Idea Have a Place in the Digital Age?”

Moral rights, the idea that artists have an intimacy with their work that runs deeper and more inalienably than their economic ones, has had an uneven history in U.S. Law. U.S. courts have at points underscored that no such right exists and at other times turned legal cartwheels to provide for an equivalent. U.S. legislators have over time proven equally schizophrenic. The question asked here is whether a more coherent path forward exists, one that might even resonate more with international perspectives, and it will be suggested an old relativizing German property concept known as *Sozialbindung* may provide the answer.

### **Prof. Jeremy Bock, Cecil C. Humphreys School of Law, University of Memphis**

“Patent Quantity”

Much of the academic commentary on the patent system’s dysfunctions has focused on patent quality. The considerable attention paid to quality issues, while necessary, overlooks a much larger problem—one of patent quantity. The generation, examination, management, and monetization of an ever-increasing number of patents and applications have been found to exert distortionary effects on the patent system, such as the U.S. Patent and Trademark Office’s prioritization of application processing over patent quality; the growth of patent thickets; the “anticommons” that impede innovation; and the rise of patent assertion entities.

In a departure from the prevailing scholarly focus on quality issues, this Article argues that the patent quantity problem must be solved first in order to solve the quality problem. Solving the quantity problem may also mitigate the other distortions in the patent system. Based on a situational analysis of the behavior of the patentees’ agents—who have been largely ignored in the literature—along with lessons from the pharmaceutical industry, this Article presents the first in-depth characterization of the agency dynamics that give rise to the quantity problem, and recommends a solution that induces patentees to exercise greater selectivity in patenting.

### **Prof. Sarah Burstein, University of Oklahoma College of Law**

“Reviving Ornamentality”

The Patent Act requires that a patentable design be, among other things, “ornamental.” In order to determine whether a claimed design satisfies this statutory requirement, the Federal Circuit has incorrectly conceptualized “ornamental” as the opposite of “functional” and will not invalidate a design unless it is dictated primarily or solely by function. And it will not deem a design to be dictated primarily or solely by function if there are alternative designs. Because there are almost always alternatives for any visual design, this test effectively reads the requirement of ornamentality out of the statute. As a result, the PTO is granting (and courts are upholding) design patents for product designs that do not promote—and are likely to impede—the progress of the decorative arts. This article will demonstrate how the Federal Circuit has gone astray and argue that the design patent requirement of ornamentality should not be viewed as a mere non-functionality requirement. Instead, it should be viewed as a requirement that the claimed design make a material visual contribution to the finished product. That is not to say that a design must be “artistic” or “beautiful” or objectively attractive. But the appearance of the claimed design must actually matter to the end user. Under this test, a design for a spare part for a car engine, a spine implant and the shape of an Apple Lightning connector would not qualify as ornamental. But a sleek design for a chair would. This conceptualization of ornamentality would better reflect the statutory language and

would prevent design patents being used as de facto utility models, channeling any useful inventions in to the utility patent regime, where they belong.

**Prof. Bernard Chao, Sturm College of Law, University of Denver**

“Testing the Frame in Patent Damages”

Searching for the highest royalty base, patentees often try to push their lawsuits downstream. That means that they sue computer and electronic manufacturers even when the accused technology is found in a semiconductor chip that these manufacturers buy. In earlier work, I suggested that patent law should allow these manufacturers to implead their semiconductor suppliers and seek contribution from them. Relying on what behavioral economists have identified as “framing effects,” I reasoned that this would push verdicts downwards because juries would calculate damages in light of the chip’s smaller value.

But both the conventional wisdom (that juries would issue higher damage awards against downstream manufacturers) and my own hypothesis (that juries would frame damages based on who the defendant was) have not been proven. Accordingly, I conducted an online experiment. Approximately 1,250 paid participants were given the same basic set of written facts. A display manufacturer had purchased graphics chips with infringing technology. The patentee asked for specific damages based on the value of the invention and the defendant(s) countered. The participants were asked to assess damages. However, they were first randomly assigned to one of five different variations that modified the identity of the defendant(s) (monitor company, chip company, or both), their legal relationship (contribution or indemnification) and information about the monitor. Importantly, the description of the patented technology and the value it contributed to the infringing product(s) remained constant.

My very preliminary findings are startling. They suggest that both the conventional wisdom and my own theory may be wrong. So long as information about the price and profit of the monitor are known, the identity of the defendant does not appear to change damages. The chip supplier was assessed royalties that appeared to be based on the significantly larger value of the monitor. Moreover, allowing the monitor manufacturer to seek contribution from the chip supplier does not appear to lower damages. If anything it increases total damages, perhaps, because two deep pockets are now available.

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

“Digital Locks, Physical Objects and Immaterial Works “

This chapter of my book on copyright user rights (Oxford University Press 2016–2017) explores digital locks and technological protection measures (TPMs) in relation to immaterial copyright works and physical objects. The chapter also explores the changing role of digital locks and TPMs as we move away from copies of copyright works users possess to services they access. I assess the various perspectives on the means necessary to achieve a proper balance between the competing interests of users and copyright holders. I argue that the legal endorsement of TPMs worldwide is a further illustration of the trivialization of the property rights of copyright users. This trivialization of users’ rights may have been initially facilitated by focusing on the distribution online of information products without a physical object. However, the increased presence of digital locks in the world of physical objects is unsettling and sheds a new light on the disregard of users’ property rights. The extent to which TPMs’ intrusion in the world of physical objects will create the impetus for legal reform remains to be seen. In parallel, the role of digital locks and TPMs in shaping right holders and users’ rights changes significantly as we shift away from accessing individualized copies of copyright works toward enjoying services. Digital locks and TPMs are the founding blocks of online pay-per-use copyright services from which users’ relinquishment of physical controls and prima facie open-ended privileges and powers over the copies of copyright works they experience is now complete.

**Prof. Deven R. Desai, Scheller College of Business, Georgia Institute of Technology**

“The Chicago School Trap in Trademark: The Co-evolution of Corporate, Antitrust, and Trademark Law”

The central claim of this article is that, as a descriptive matter, trademark legislation and court interpretation is a close normative match with the Chicago School approach of scholars such as Robert Bork and Richard Posner. The organizing intellectual structure of modern trademark law, as developed in the law, has been freedom of action for the owner of the mark, not minimizing search costs as repeatedly stated in academic writing. This article thus reveals that modern trademark law is a subset of the Chicago School’s approach to the firm, deference to management, and competition. That view is not interested in limiting firms or trademarks; its goals lie in the opposite direction.

Understanding this reality dramatically changes the normative project of trademark scholars and reformers. Instead of chastising judges for their mistaken understanding of search costs, potential reform must recognize the reigning intellectual structure and shape recommendations in light of it. As a normative matter, challenging current trademark law becomes essentially the same debate as challenging the Chicago School approach to antitrust and corporate law.

This Article thus frees trademark scholarship to mount a clearer critique and deeper attack on what truly drives trademark law. This approach allows discussions of social costs in trademark policy to focus on other aspects of welfare rather than serving total wealth maximization. In addition, the approach shows that behavioral economics—which has mounted an effective critique on antitrust and corporate law—should also be marshaled to question the now identified core of trademark law. As a question of trademarks’ function in the marketplace, the approach offers a way to reclaim the term, information, and recast trademarks as information devices that serve all in the marketplace rather than mainly producers. In short, I offer that this Article’s diagnosis of trademark law explains how trademark law works and its current foundation, which in turn provides a way out of its current conceptual trap and towards normative outcomes that current critic’s desire.”

**Prof. Tonya M. Evans, Widener University Commonwealth Law School**

“Copyright Reclamation in the Age of Celebrity Loan-Out Corporations and Nonprobate Copyright Transfers”

This Article explores the intersection and disconnect between copyright law and nonprobate property transfers at death when a copyright owner dies before having the opportunity to exercise her termination right of an inter vivos copyright transfer. Specifically, I explore the impact of an heir’s copyright transfer termination right on the original copyright owner’s freedom of testation to the extent the decedent’s nonprobate disposition of assets is contrary to the “statutory will” disposition found in the Copyright Act.

Although copyright transfers made by will are not subject to a termination right, no such exception is made for a copyright owner’s lifetime transfers into vehicles controlled by the copyright owner. Examples of such lifetime transfers include those made into an actor’s or performing artist’s loan-out company or a songwriter’s lifetime transfer of musical composition and sound recording copyrights into his or her revocable trust. The practical effect is that an heir (spouse or lineal descendant), who inherits the right to terminate a lifetime copyright transfer, may exercise that right and successfully reclaim copyright ownership against the decedent’s intent to transfer at death copyright ownership via a nonprobate device to someone or some entity other than that statutorily prescribed heir.

Many scholars, practitioners, and copyright transferees in the entertainment business surmised and theorized the likely impact of the first reclamation trigger date of January 1, 2013 on transfer terminations within the entertainment industry. Some also expressed concern with the apparent distinction between, and treatment of, transfers by will and nonprobate transfers. This article focuses on what has actually

transpired since that trigger date. In addition, the article focuses on what might be done going forward to reconcile the probate and nonprobate disposition of copyrights in a way that best honors a testator's intent given what we now know in fact.

**Prof. Susanna Frederick Fischer, Columbus School of Law, Catholic University of America**  
“Learning from the UK’s Copyright Hub: A Model for U.S. Copyright Law Reform?”

In recent years, on both sides of the Atlantic, there have been strong calls for radical copyright reform on the basis that decades-old copyright statutes are totally inappropriate for a digital age. One of these calls, a government commissioned report by Prof. Ian Hargreaves, recommended the creation of a digital copyright exchange to simplify copyright licensing. This was designed to benefit users, by making it easier to locate copyright owners and legally license content, while also generating revenue for content creators. A pilot digital copyright exchange, renamed the Copyright Hub, was launched as an experiment in 2013, and its technology went live in the summer of 2015. This paper considers whether United States copyright policy should endorse the copyright hub model and if so, what type of governance model should be implemented for the United States Copyright Hub.

**Prof. Thomas C. Folsom, University of North Dakota School of Law**  
“What to do with Our Broken Patent System”

This is a continuation of work I have been doing. It comes in the form of three testable propositions and a concluding question (and answer).

First Proposition. The Patent System is broken. One of its many failures is its maladapted accommodation to incremental improvement inventions. As a matter of fact, incremental improvement accounts for a substantial plurality (perhaps a substantial majority) of inventions. As a matter of law, we must have more than an obvious step. If many incremental improvements are obvious, and if we nonetheless wish to encourage them, then our current system is perversely designed. This is because at least three results seem predictably to follow: (1) the system will routinely refuse patents on a non-negligible number of obvious but valuable (OBV) inventions, (2) it will routinely grant patents on a non-negligible number of OBV inventions, and (or) (3) it will do both, as if by lottery mechanism, and so no one will know what is signified by a “good” patent or a “bad” patent, and nor will anyone know what it means to be “really” non-obvious as opposed to “de jure” non-obvious. Let us call a perversely designed system such as this “systemically broken.”

Second Proposition. The system being systemically broken, we might continue to muddle on as before. The problem? Neo-tech inventions (coded “methods”), neo-global lock-in of bad rules (over-harmonization), and neo-justice concerns (patented pharmaceuticals, patented food, patented water, and other patented “necessities” coupled with non-scarcity-based economics at the marginal cost of producing coded products in the face of worldwide “need”) will likely cause unbearable pressure on a failed system. The result might be total collapse (tossing the bathwater out with the baby or vice versa). Let us call this an “unacceptable risk of collapse” of an already discredited system.

Third Proposition. The system being systemically broken, and muddling on being fraught with unacceptable risk of collapse, we might need to think the unthinkable: some plan to fix the worldwide system before it breaks wide open. I propose a Public Domain Protection Agency (PDPA) empowered to issue patents on novel OBV inventions, upon election by an inventor to accept a shorter term, limited remedies, and other specified levels of protection less than what would be accorded a “genuinely” non-obvious patented invention. In exchange for lesser rights, the holder of a patent on a Novel OBV invention would have a conclusive presumption of validity, and other advantages flowing from the

certainty of at least some protection without the necessity of the juridical risk inherent in present patent controversies (trading scope for certainty).

#### Concluding Question and Answer

Query: A PDPA does not exist, but what might it look like? (What conceivable basis is there for supposing it might actually work?)

Answer: It might look like the Securities and Exchange Commission, created under enabling legislation not unlike selected provisions of the 33 Act and the 34 Act. The PDPA might be authorized to create classes of patents, including a class of Novel OBV inventions. It might create registration forms for each class, with disclosure items keyed to something analogous to Rule S-K. The PDPA might have an actual staff, including economists, and it might make findings about various internal rates of return appropriate for various industry segments and it might set terms of protection for NOBV inventions after something like rate-making hearings to determine value and to set plausible economic incentives. The PDPA might create various “safe harbors” so that registrants meeting certain objective conditions would be “deemed” entitled to a valid NOBV patent. And so on. It just might work. Because there is no other alternative remotely possible, it might be not just the best of all possible solutions, but the only one. (The “conceivable basis” for supporting this proposal is that it is not impossible, and therefore it is superior to all other ideas, and is better than doing nothing).

#### **Prof. Stefania Fusco, DePaul University College of Law**

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

In 1474, the Venetian Republic enacted what is widely recognized as the first Patent Act in the world. Legal scholars have generally assumed that subsequently, patents were granted in Venice based on this Act, or in other words, based on Venice’s statutory patent system. Indeed, they relied on the writings of historians and political scientists who did not have legal training, and who, consequently overlooked many of the legal nuances of the Venetian patent system. In fact, up until now, only two other legal scholars have examined the original Venetian patents. In this article, I use original documents from the Venetian State Archives to present a detailed account of how the Venetian Republic used its customary patent system to tailor protection to the unique characteristics of the invention. The Venetian patent system appears to have been a very successful one; it operated for more than 300 years. During the 16th century, Venice transformed itself from being a nation of sailors to being a nation of artisans and engineers, ultimately becoming the center of technological development in Europe. Thus, the Venetian customary patent system is an important example of how tailored patent protection can be provided. The accurate description of this system is crucial to further understanding the specific steps that we would need to take to achieve this goal today.

#### **Prof. Shubha Ghosh, University of Wisconsin Law School**

“Are Universities Special?”

Patent law creates special rules for universities in some instances. In other cases, universities are subject to the same rules as other entities. Should there be special intellectual property rules for universities? This presentation will address the pros and cons of this issue.

#### **Prof. Michael P. Goodman, George Washington University School of Law**

“What’s So Special About Patent Law? Devoting Technical—Not Legal—Expertise to Patent Cases”

The widespread belief that patent law is special has shaped the development of patent law into one of the most specialized areas of the law today. The belief in patent law’s exceptionalism manifests itself as two

related presumptions with respect to the judiciary: first, that generalist judges who do not have patent law expertise cannot effectively decide patent cases, and second, that judges can develop necessary expertise through repeated experience with patent cases. Congress showed that it subscribed to both views when it created the Federal Circuit and the patent pilot program. In recent years, however, the Supreme Court has rejected these premises, and with them it effectively repudiated Congress's efforts to specialize the patent judiciary and the law applicable to patents. The Court has recognized that what is special about patent cases is not the law, but is instead that these cases often involve difficult subject matter, which require technical or scientific expertise. While Congress's early attempts to deal with these difficulties focused on courts with legal, rather than technical, expertise, the Supreme Court's recent pronouncements suggest that they should have been doing the reverse. This article describes why the need for specialization related to patent cases is best achieved at the administrative level, and that a viable solution has already been implemented in the form of the recently created Patent Trial and Appeal Board. The article proposes expansion of that solution by making that new entity the exclusive forum for deciding issues of patent validity.

**Dr. Patrick Goold, Chicago-Kent College of Law**  
**Prof. Oren Bracha, University of Texas School of Law**  
"Copyright Accidents"

It is a deeply entrenched principle that copyright infringement does not require fault. The article reexamines this principle in the context of copyright accidents. Copyright accidents occur when *ex ante* it is not certain whether a proposed use will result in copyright infringement. In cases where the copyright status of a work is unclear, where the preferences of the copyright owner are reasonably in doubt, or where the copyst is unaware he is copying, there is merely a *risk* that a proposed use will infringe the right. And troublingly, the measures that any party could take to reduce that risk—for example, searching for the copyright information, registering the work, or forgoing the use altogether—impose costs. Under modern conditions copyright accidents are ubiquitous, but they are invisible to copyright law. The law has no doctrinal or conceptual mechanism for dealing with them. In such circumstances the question becomes, how should the law be calibrated to incentivize both users and owners to optimally invest in measures to prevent the infringement?

To answer this question we apply, *mutatis mutandis*, the well-developed theoretical framework of tort law to copyright accidents. This framework compares the relative merits of alternative liability rules applicable to accidents. Typically, tort law deals with the problem of optimal accidents prevention through the application of negligence rules. Such rules incentivize both potential injurers and victims to invest optimally in prevention. We compare the relative advantages and disadvantages of the available liability rules in the context of copyright accidents. The article finds that employing one of the variants of a negligence rule in copyright would be justified by both efficiency and other consequence-oriented normative theories of copyright. Doing so would incentivize both the copyright holder and copyright user to take optimal measures to avoid copyright accidents and would allow sensitivity of the liability standard to externalities that are often associated with intellectual works. We demonstrate how adopting a negligence rule would positively affect numerous real world copyright controversies, such as the problems of mass digitization, orphan works, and subconscious copying. We conclude by discussing several alternatives for the doctrinal implementation of negligence-based rules to copyright accidents.

**Prof. Sam Halabi, University of Tulsa College of Law**  
"International Intellectual Property Shelters"

The battle over the reach and strength of international protections for intellectual property rights is one of the critical flashpoints between wealthy and low-income countries as those protections are perceived to obstruct access to essential medicines, thwart regulatory efforts to promote individual and population

health, and undermine traditional forms of agriculture and food production. While scholars have thoroughly tracked the bilateral and multilateral trade and investment treaties responsible for the expansion of international intellectual property rights worldwide, they have paid significantly less attention to the strength and form that opposition to international intellectual property expansion has taken. This Article examines the proliferation of international legal agreements which carve out special areas of intellectual property for treatment that differs from protections extended under international trade and investment rules and argues that they should be reconceived as a unified body of international economic law. Responding to demands from low- and middle-income countries that benefits from intellectual property protections be more equitably shared, these “International Intellectual Property Shelters” include the Doha Agreement on TRIPS and Public Health, the World Health Organization’s Pandemic Influenza Preparedness Framework, the Framework Convention on Tobacco Control, the International Treaty on Plant Genetic Resources for Food and Agriculture, and the Medical Research and Innovation Treaty. The article analyzes the circumstances that give rise to International Intellectual Property Shelters and the aspects of intellectual property rights they attempt to regulate. While these shelters are advocated as safeguards for areas of global public welfare like food security and population health, they tend to arise in areas where a small number of knowledge-intensive firms dominate global markets. International intellectual property shelters should therefore be understood as forms of supranational regulation of those firms.

**Camilla Hrdy, University of Pennsylvania Law School**  
“Patent Nationally, Innovate Locally”

Academics have long debated whether intellectual property rights should be replaced or supplemented by “innovation finance”: direct public financing for innovation like grants, prizes, or tax incentives, rather than exclusive rights. However, this possibility forces us to consider a different question: which level of government should be responsible for innovation finance—the national government, or local governments like states and cities? This Article raises the prospect that just as intellectual property necessitates a move towards global uniformity, innovation finance may be intrinsically connected to localism. At a descriptive level, patent, copyright, and trademark are mostly federal law. But outside mission areas like defense, innovation finance is often supplied or at least administered by the states and cities in which innovators locate. I argue this reality can be explained, and potentially justified, based on the principle that public policies should be adopted by the smallest jurisdiction that internalizes the benefits of its actions without creating externalities (spillovers) for other jurisdictions. Local governments cannot internalize the benefits of intellectual property regimes that implicate widespread disclosure of easily transferable information in interstate markets; therefore, it is far more efficient for patents, copyrights, and trademarks to be federal law. But local governments can internalize a significant portion of the benefits of public spending on innovation. The reason is that, even though knowledge eventually spills over geographic borders, it tends to remain “stuck” for a time in the place in which it originated, forcing others who seek access to locate nearby. The regions in which these “innovation clusters” develop experience significant economic benefits: more taxable revenues, less unemployment, more spending on local businesses. Therefore, a body of theory suggests that even if most intellectual property law should be national, innovation finance should often be subnational in order to capitalize on local governments’ stronger incentives to foster innovation at the regional level, and the efficiency-promoting effects of inter-jurisdictional competition. The race to be “the next Silicon Valley” has serious downsides—not least of which is severe geographic equality. The point is that, once intellectual property laws are not the only policy solution on the table, the role of localism in innovation policy cannot be ignored.

**Prof. William Hubbard, University of Baltimore School of Law**  
“Razing the Patent Bar”

In discussions of the social utility of the patent system, the benefits of competition have played increasingly important roles, but one aspect of the patent system has largely escaped scrutiny: the Patent Bar. The paucity of scholarship in this area is surprising, given that innovators spend billions of dollars each year on legal services in the Patent Office and that the Patent Bar enjoys exclusive access to this market. Moreover, the Patent Bar is unique among legal bars in requiring that members possess special undergraduate credentials, such as a degree in engineering. This Article analyzes whether this feature of the Patent Bar effectively supports innovators by comparing the historical and economic justifications for the Patent Bar’s eligibility requirements with modern realities. Critically, the Article argues that the Patent Bar’s eligibility requirement limits the supply of legal services in the Patent Office, which generates higher prices that some innovators cannot afford. Moreover, although some occupational licensing regimes provide net benefits, the Article argues that the Patent Bar’s technological background requirement currently does more harm than good. Accordingly, the Article proposes that the Patent Bar be restructured so that lawyers without formal technical education can join. Given the Patent Office’s historical resistance to expanding the Patent Bar and its economic interest in preserving the status quo, the Article also recommends avenues for effecting this change.

**Prof. Eric E. Johnson, University of North Dakota School of Law**  
“Disentangling the Right of Publicity”

This paper tackles a congenital problem inhering in right-of-publicity doctrine. I begin with a puzzle: According to blackletter law, the right of publicity provides persons with the exclusive right to the commercial use of their name, image, likeness, voice, and other indicia of identity. Looking just at the doctrine, the right of publicity seems to have a breathtaking scope. But the overwhelming majority of the factual situations embraced by the blackletter rule are not actionable. For instance, commercial use of persons’ names and images is the entire business model of celebrity gossip magazines. By the same token, commercial exploitation of people’s identities is the bread and butter of credit-reporting agencies. Yet a right-of-publicity claim in these areas is unthinkable. A review of the cases shows that instead of being defined positively, the scope of the right of publicity is mostly defined negatively—largely through the application of independent defenses such as free-speech guarantees and copyright pre-emption. I suggest that this is problematic for a number of reasons. To have doctrine that is coherent and in conformance with the cases, I conclude that the right of publicity must be broken up. It should be thought of as three distinct causes of action: the endorsement right, the merchandising entitlement, and the doctrine of unfair exploitation.

**Prof. Dmitry Karshedt, George Washington University Law School**

“Photocopies, Patents, and Knowledge Transfer: The Uneasy Case of Justice Breyer’s Patentable Subject Matter Jurisprudence”

The essence of Justice Breyer’s discomfort with patents, as expressed in his opinion for the Supreme Court in *Mayo v. Prometheus* and his dissent from the order dismissing certiorari in *LabCorp v. Metabolite*, is strikingly similar to his critique of copyright law in “The Uneasy Case for Copyright,” a well-known article he wrote as Prof. Breyer some 45 years ago. In “The Uneasy Case,” Breyer argued that the burdens on reproduction of technical articles imposed by copyright law restrict the flow of information and prevent scientists from enjoying the spillover benefits of published research. His patent opinions, too, talk of diminished access to information resulting from intellectual property protection. In this Essay, I contend that the parallel that Breyer implicitly draws between the harms of copyright and patent is a false one. Furthermore, I argue that this error explains a great deal of what is wrong with his patentable subject matter jurisprudence. In particular, Breyer appears to overlook the notion that

inducement of disclosure and dissemination information is one of the very purposes of patent law, and ignores the fact that a patent cannot be infringed merely by the use of the information contained within it. I maintain that, once the error is understood, it becomes clear precisely why the outcomes of cases like *Mayo* are incorrect. To be sure, Justice Breyer’s position is not without merit. For even though patent law does not generally place barriers on access to information de jure, unclear claim scope can impede downstream researchers who wish to make use of the information in a patent—by pursuing design-arounds and otherwise building upon the subject matter of the claims—de facto. But that, however, does not seem to be the problem with the claims in cases like *Mayo*. Moreover, patents that do threaten the uses of the information that they contain can be dealt with via the rigorous application of the novelty, non-obviousness, and definiteness requirements, and other measures that do not require an expanded application of patentable subject matter exclusions to invalidate claims.

**Prof. Ariel Katz, Faculty of Law, University of Toronto (Canada)**  
“Digital Exhaustion”

Rumor has it that the first-sale doctrine is dying, at least with respect to works in digital formats sold online and untethered to any particular tangible object. This paper argues that the rumor is premature. It offers an understanding of exhaustion as a broader principle and shows how that principle can be applied to digital works.

**Prof. Jessica M. Kiser, Gonzaga University School of Law**  
“Brands as Copyright”

Trademark law’s foundational purpose is to protect consumers from being misled about the source of a good or service. While trademarks are typically included within the larger concept of a company’s brand identity, brands are used for purposes other than assuring a consistent source for products. In my article, I argue that brands should be reconceptualized under copyright law instead of their traditional treatment as an extension of trademarks. Numerous scholars have argued against the rapid expansion of trademark law that has created new grounds for liability for claims like dilution and post-sale confusion. This expansion of trademark law can be viewed as the result of trademark law’s attempt to protect the interests of brand owners. While intended to benefit brands, these changes to trademark law have had unintended consequences, many of which actually harm brand owners. Marketers envision a brand as a story that unfolds over many marketing efforts, and this brand narrative offers consumers creative content with which to engage and adopt as part of their own self-identity. Brands invite consumer involvement in the brand development process in a way that is not contemplated, and is often prohibited, under trademark law. As such, a better approach to brands views them in a similar fashion to copyrighted works and fan fiction under copyright law. By recognizing the proper place for brands under copyright law, trademark law can reclaim its focus on protecting consumers, and brand owners will be better supported in their efforts to build strong, creative and engaging brands.

**Prof. Brian J. Love, Santa Clara University School of Law**  
“Patent Litigation in China: Protecting Rights or the Local Economy?”

Though it lacked a patent system until 1985, China is now the world leader in patent filings and litigation. Despite the meteoric rise of the Chinese patent system, many in the West believe that it acts primarily to facilitate local protectionism, not innovation. Recent high-profile patent suits filed by relatively unknown Chinese firms against high-profile foreign tech companies, like Apple, Samsung, and Dell, have only added fuel to the fire. Surprisingly, given how commonplace assertions of Chinese protectionism are, little empirical evidence exists to support them. We fill this gap in the literature by analyzing five years of data on patent suits litigated in courts with the fifty most active intellectual property dockets in China. Among other things, we find that Chinese patent suits are highly concentrated in a handful of major urban

jurisdictions—not in rural courts where protectionism is most often alleged to take place—and also have rates of success and appeal very similar to those of U.S. patent suits. We also observe that foreign companies appear in Chinese patent suits most often as patent enforcers, not accused infringers, and win their cases roughly as often as Chinese patentees. Finally, we find that patents litigated in China are generally more than five years old at the time of assertion and frequently have family members issued by foreign patent offices. Together, our findings tend to contradict conventional wisdom that China’s patent system has been structured to benefit domestic industry at the expense of foreign firms.

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

“The Right of Publicity and the First Amendment: A Fundamental Re-Examination”

As courts have steadily expanded the right of publicity, defendants and academic commentators have desperately searched for legal theories and principles that will serve to cabin the right. In their desperation, some defendants and courts have seized on the First Amendment’s free speech guarantee as a potential savior. While I am sympathetic to the desire to set limits on the right of publicity, I believe the First Amendment is a poor vehicle for doing so for three reasons. First, the First Amendment’s free speech guarantee provides no principled basis for the limitations on the right of publicity that the defendants seek. Second, relying on the First Amendment displaces and stunts the development of a more sensible evaluation of what society has to gain and what it has to lose by recognizing a celebrity or other individual’s right to control certain uses of his or her image or persona. And, third, relying on the First Amendment to define sensible limits on the right of publicity may instead serve to expand the right of publicity. Searching for a First Amendment limit, and finding none, a court may be more willing to accept that the right of publicity covers the activity at issue in the first place.

In short, I believe that relying on the First Amendment’s free speech guarantees to define sensible limits on the right of publicity represents a house of cards. It may work in the short-term, and prove helpful to particular defendants in particular cases. But even when courts have relied on it to limit the right of publicity, the First Amendment rarely does so in a sensible and persuasive manner. And reliance on it prevents us from developing more sensible and persuasive limits on the right of publicity. In this article, I develop this position and suggest how a rational balancing of costs and benefits could define more sensible and persuasive limits on the right of publicity.

**Prof. Irina D. Manta, Maurice A. Deane School of Law, Hofstra University**

“Branded”

Marks are traditionally said to serve three functions that are separate from the goals of other forms of IP: source identification, advertising, and guarantee of quality. The story, however, that patents and copyrights incentivize creation and that trademarks do not serve that purpose does not withstand scrutiny. This Article argues that brands have evolved in such a way that they serve important incentivizing purposes of their own. This Article identifies three generally neglected functions of trademarks. The first pertains to the creation of original, unique marks in and of itself. Indeed, this Article contends that logos and other marks possess a fan base that engages in artistic and other appreciation similar to the enjoyment derived from copyrighted works. The second underexplored function of trademarks is to combine with products and provide new hedonic experiences to consumers in a way that is qualitatively little different from experiences of copyrighted or patented goods. Third, and perhaps most controversially, trademarks—in part, but not exclusively, through the creation of status goods—incentivize socially desirable behavior such as hard work and productivity that increase economic welfare. This Article thus seeks to restore, or rather construct for the first time, as a theoretical matter the stature of trademarks as a full member of the family of intellectual property. The Article concludes with some thoughts about the possible implications for trademark doctrine of this conceptual shift.

**Tim McFarlin, Elon University School of Law**

“An Idea of Authorship: Orson Welles, The War of the Worlds Copyright, and Why We Should Recognize Idea-Contributors as Joint Authors”

Did Orson Welles co-author the infamous War of the Worlds broadcast? The Ninth Circuit Court of Appeals has told us no, primarily because he only contributed the idea behind the broadcast, and ideas alone cannot be copyrighted. “An Idea of Authorship” challenges this premise—that ideas, no matter how significant, cannot qualify for joint authorship in collaborative works—and argues that we as a society should, under certain circumstances, recognize idea-contributors like Welles as joint authors. We should do so to further our society’s interest in encouraging future creations, as well as out of a sense of equity and fairness to idea-contributors, acknowledging the value of ideas to creative work. Recognizing idea-contributors as joint authors would increase the contractual bargaining power of many of our society’s most creative minds and ultimately better foster the free flow of ideas essential to the constitutional goal of promoting the “Progress of Science and useful Arts.”

**Prof. David S. Olson, Boston College Law School**

“Abstractness as Proxy for Field Preemption”

*Alice v. CLS Bank* is the latest in a line of Supreme Court cases emphasizing that abstract ideas are not patentable subject matter. Like the Court’s earlier cases in this area, however, its latest opinion has left lower courts uncertain as to how to determine how much abstractness is too much. The lower courts have been making best efforts to determine abstractness according to the *Mayo* two-step test set out by the Supreme Court in *Mayo v. Prometheus* and emphasized in *Alice v. CLS Bank*. This paper examines applications of the *Mayo* two-step test to date, and argues that the best, and most predictable, way to apply it is as a means of preventing preemption within the particular field in which the invention is made. By taking a field-specific approach to preemption, and making sure that claims are not so broad as to preempt reasonable competition in the field, the *Mayo* two-step can be applied in a useful, and even somewhat predictable way.

**Prof. Lisa P. Ramsey, University of San Diego School of Law**

“Trademarking Everything? Why Brands Should Care About Limits on Trademark Rights”

Many leading brands instinctively favor the expansion of trademark rights. They are often the owners of several registered trademarks, and may claim exclusive rights to a variety of common law trademarks, including descriptive words, colors, product configurations, scents, sounds, tastes, textures, and movements used in connection with the advertising and sale of their goods or services. While there are some limits on what can be protected as a trademark, including the distinctiveness requirement and categorical exclusions of some types of subject matter (such as national flags or emblems), trademark offices and courts around the world are increasingly protecting exclusive rights in informational language, colors, and product attributes in a manner that may harm fair competition and the free flow of expression. The goal of this project is to convince trademark owners, including the leading brands, that limits on trademark rights will benefit them, and not just benefit start-up competitors, critics, and commentators.

**Prof. Guy A. Rub, Michael E. Moritz College of Law, Ohio State University**

“Zoom-in Zoom-out of Copyright”

Copyright law provides exclusive rights in fixed creative works. This article explores the meaning of “works.” More specifically, the article explores when the law should perceive a copyrighted good as a large comprehensive whole, an approach we call “zoom-out,” and when should it perceive a copyrighted good as a combination of many small works, an approach we call “zoom-in.” When we zoom out, a music album can be perceived as one large work. When we zoom in, the album is a collection of works: the

songs. When we zoom in even further, each song consists of several works: the performance, the music, and the lyrics. The choice of zoom has significant doctrinal consequences.

The need to set the correct level of zoom cuts across several doctrines in copyright law. Copyright case law, for example, determines tests for joint authorship that look at the contribution of each alleged author to the work, but that level of contribution is different depending on whether courts zoom in or zoom out on the work. Or, to take another example, the Copyright Act sets statutory damages “with respect to any one work,” but does not state whether courts should zoom-in or zoom-out, in determining how many works were copied. Work made for hire in a compilation can be commissioned, but determining if a work is a compilation depends on whether the court zooms-in or zooms-out. The question of the proper level of zoom affects a host of other doctrinal issues, such as ownership of copyright, length of protection, registration of individual works within compilations, fair use, and termination rights. We are not the first to recognize the fragmentation of copyrighted works. The potential transaction costs raised by copyrighted “microworks” has been discussed in the literature on remix culture and collaborative work, and elsewhere. In this article, however, we aim to identify how courts have chosen the proper level of zoom. We ask whether there is any consistency treatment across doctrines, and whether there should be.

**Prof. Eva E. Subotnik, St. John’s University School of Law**  
“Artistic Control After Death”

To what extent should authors be able to control what happens to their literary, artistic, and musical creations after they die? Looked at through the lens of general succession law trends, there is some evidence to suggest that strong control is warranted. The weakening of the Rule Against Perpetuities, the rise of the honorary trust, and the availability of conditional bequests all portray a tightening grip of the dead hand. And yet, an unconstrained ability of the dead to determine future uses of works of art, music, and literature seems fundamentally troubling. This article situates the instructions given by authors with respect to literary and artistic works within the types of instructions given by decedents with respect to other bequests. In particular, it considers whether the use of a fiduciary duty to ensure artistic control is an appropriate and enforceable maneuver. Weighing in favor of such enforcement, arguably, are the natural and personhood rights of author-testators as well as the possible up-front incentive effects on them. Weighing against, arguably, are the natural and personhood rights of others as well as the possible long-term effects on cultural development. In balancing these competing interests, this article considers, among other things, the demands of both federal copyright policy and state trust and right of publicity laws. In the end, it argues that authorial instructions must yield to the needs of the development of culture. Such a view requires that some living person(s) be in a position to make decisions about the uses of literary and artistic works.

**Dilan Thampapillai, Australian National University College of Law (Australia)**  
“A License or a Contract? An Antipodean Perspective on Creative Commons”

In Australia the Creative Commons (CC) movement has become the licensing regime of choice for those copyright owners who wish to make their content freely available for users. The largest of these copyright owners is the Australian Government which has applied CC licenses to a wide variety of public sector information. The uptake of CC licenses has been widespread and enthusiastic, but little thought has been given to the consequences and potential pitfalls associated with adopting this licensing regime. In the United States there has been a long running debate over whether open access licenses can be regarded as mere licenses or as contracts. This debate concerns the nature of the legal regime that will govern these licenses. On the one hand a license may be a mere permission to use property, on the other hand it may give rise to a contract thereby importing all manner of doctrinal rules into an otherwise simple arrangement. The distance that can be said to exist between property and contract law becomes

vanishingly thin in the context of CC licenses. The true position may well be that the two regimes must co-exist. This raises the issue of the uneasy relationship between contract law and copyright law. Given the proliferation of CC licenses this issue is now of critical importance to Australian lawyers. This paper examines Australian and U.S. perspectives on the question of whether CC licensing gives rise to contractual obligations.

**Prof. Andrew W. Torrance, University of Kansas School of Law**

“Are Litigated Patents More Important?” (with Jevin D. West)

Various correlates of patent value, influence, and importance have been proposed. These include payment of maintenance fees, size of patent family, number of claims, and how frequently a patent has been litigated. We test two hypotheses: (1) litigated patents tend to be more important than average; and (2) patent importance rises with the level of court (that is, district court, Court of Appeals for the Federal Circuit (CAFC), and United States Supreme Court) patent litigation reaches. Citations are widely regarded as useful indicators of the technological importance of inventions disclosed by patents, as well as of the economic value of that patent. Using a hierarchical method of analysis, we constructed a graph of the complete citation network of all United States patents issued from 1976 to 2014, and assigned every node (that is, an individual patent) an objective importance score. We set the mean importance score for all patents to 1.0. Importance scores scale directly with numerical value, so 10.0 indicates a patent ten times as important as the mean and 0.1 indicates a patent only one tenth as important as the mean. Using a dataset of patents litigated to a decision at a district court, the CAFC, and the Supreme Court from 2000–2014, and patent importance scores assigned to each litigated patent, we tested hypotheses (1) and (2). Preliminary results indicate that patents litigated in district court have a mean importance score of about 4.5, those litigated in the CAFC have a mean importance score of about 6.5, and patents litigated in the Supreme Court have a mean importance score of about 8.3. This suggests that (1) litigated patents do appear to be considerably more important than average and (2) patent importance rises markedly from district court to CAFC to Supreme Court. In addition, we show that litigation data for individual federal judicial districts (and the federal judicial circuits in which they are situated) show wide variation in the mean importance of patents litigated therein.

**Prof. V.K. Unni, Indian Institute of Management Calcutta (India)**

“Indian Judiciary’s Non-FRAND-ly Approach on Standard Essential Patents: The Urgent Need for Reform”

Standard setting organizations, while administering Standard Essential Patents (SEPs), have a duty to enforce an intellectual property rights policy which mandates its members to license their SEPs under Fair, Reasonable and Non-discriminatory (FRAND) terms. However, the lack of uniformity regarding interpretation of FRAND terms across various jurisdictions has resulted in a flurry of costly litigation around the globe. India has also witnessed a sudden surge in SEP litigations, with over ten lawsuits being filed in various courts in the last two years, involving some prominent companies like Ericsson, Xiaomi, Gionee etc. This paper examines the approach taken by Indian judiciary regarding SEP litigation along with the court’s interpretation of FRAND commitments.

**Prof. Deepa Varadarajan, J. Mack Robinson College of Business, Georgia State University**

“Possession Problems in Patent and Property Law”

Both property law and patent law must designate the acts that establish ownership or acquisition of property rights. Patent law imposes various requirements for acquiring a patent. Because the patent statute does not distinguish between technologies or industries, it is often described as one-size-fits-all or unitary. In practice, however, courts apply certain patent requirements differently (and more vigorously) to different technologies. While some commentators criticize this different treatment, others argue that

patent law should be even more industry or technology-specific. Traditional property law's "possession" doctrine, which established rules for acquiring tangible resources, provides an illuminating source of comparison. American courts initially applied common law rules of first possession across a wide range of subject matter—e.g., wild animals, water, oil. Despite a nominally one-size-fits-all possession doctrine, however, courts applied the rules quite differently to different resources. In both contexts—tangible property and patent law—courts' manipulation of acquisition rules responds to concerns of "early-claiming," "over-claiming," and "messy-claiming."

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

"The Antitrusting of Patentability"

This Article explores a tendency among courts to evaluate the validity of patents in a manner analogous to antitrust analysis, and discusses the implications of that tendency. The discussion begins by differentiating the substantive requirements for patentability into two sets: those which address the content of innovations, and those which address the mechanisms for disseminating innovations. Though these sets of requirements serve distinct (albeit related) policy functions, the threshold question of patent eligibility draws from both sets inconsistently, particularly—and illustratively—in applying the doctrine of preemption. Drawing on lessons from antitrust jurisprudence, the article proposes potential solutions for clarifying the doctrinal relationship between subject-matter eligibility and other requirements for patentability.

**Prof. Ari Ezra Waldman, New York Law School**

"Social Networks and Intellectual Property"

In an important and oft-cited essay, Prof. Jonathan Zittrain came to the profound conclusion that intellectual property owners and personal data owners want the same thing: "control over information." Prof. Zittrain's view that copyright owners and patients both shared the same fear of loss of control over data makes a great deal of sense. But recognizing that the fields share the same "deep problem" of loss of control is only a first step: conceptualizing the problem of privacy and intellectual property merely as loss of control does not give us the tools to answer several vexing questions in both fields. This essay is one in a series of projects that call for using social network theory and trust to draw the line between public and nonpublic information in the privacy and intellectual property contexts. Specifically, this essay argues that embedded in intellectual property doctrine itself is a corollary to Prof. Zittrain's thesis—namely, that control is determined and lost relative to a specific social network. In each intellectual property regime, legal protection over information is a network-specific phenomenon. This essay teases out this important yet underappreciated aspect of intellectual property theory and concludes with practical implications for this social science vision of intellectual property.