2010 Intellectual Property Scholars Roundtable
Drake University Law School

FINAL PROGRAM

FRIDAY, MARCH 26, 2010

8:30     Breakfast

9:00     Welcoming Remarks
          Prof. Peter K. Yu, Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School

9:15     Panel 1: Copyright Law I

          Presenters: Prof. Tonya M. Evans, Widener University School of Law—Harrisburg
          “Sampling, Looping and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law”

          Prof. Steven A. Hetcher, Vanderbilt University Law School
          “What Happens When Copyright Takes Tort Seriously?”

          Zvi Rosen, Esq.
          “Copyright, Advertising, and Unfair Competition”

          Prof. Julie Cromer Young, Thomas Jefferson School of Law
          “Death Plus Seventy: Copyright in Memoriam”

11:00    Coffee Break

11:15    Panel 2: Patent Law I

          Presenters: Prof. Robert A. Bohrer, California Western School of Law
          “The Reverse Doctrine of Equivalents to Limit Reach-Through Claims to Drug Target Patents”

          Prof. Chidi Oguamanam, Dalhousie Law School (Canada)
Prof. Greg R. Vetter, University of Houston Law Center
“Patent Law’s Unpredictability Doctrine & the Software Arts”

1:00  Lunch

2:00  Panel 3: Copyright Law II

Presenters:  Prof. Annemarie Bridy, University of Idaho College of Law
“Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement”

Prof. James Grimmelmann, New York Law School
“The Elephantine Google Books Settlement”

Prof. H. Brian Holland, Texas Wesleyan University School of Law
“Transformative Fair Use Through a Social Semiotic Frame”

Prof. Peter K. Yu, Drake University Law School
“The Graduated Response”

4:00  Coffee Break

4:15  Panel 4: Patent Law II

Presenters:  Prof. Gregory Dolin, George Washington University Law School
“Addressing Reverse Settlement Problem Through Patent Law”

Prof. Megan M. La Belle, Columbus School of Law, Catholic University of America
“Patent Litigation, Personal Jurisdiction, and the Public Good”

Prof. David Schwartz, Chicago-Kent College of Law
“Doctrinal Displacement at the Federal Circuit”

Prof. Ted Sichelman, University of San Diego School of Law
“Do Economic Downturns Dampen Patent Litigation?” (with Prof. Alan Marco, Department of Economics, Washington & Lee University)

6:00  Roundtable Adjourns for the Day

7:00  Dinner for Roundtable Participants

The Embassy Club
801 Grand Avenue
Saturday, March 27, 2010

8:30  Breakfast

9:00  Panel 5: Copyright Law III

Presenters:  Prof. Alina Ng, Mississippi College School of Law
             “Is There a Right to Access?: Of Authors, Publishers, and Users”

             Prof. David A. Simon, Concordia University Chicago
             “Reasonable Perception and Parody in Copyright Law”

             Alexandra Sims, Senior Lecturer, Department of Commercial Law, University of
             Auckland (New Zealand)
             “Appellations of Piracy?: Fair Use’s Prehistory”

             Prof. Ned Snow, University of Arkansas School of Law
             “Forgotten Facts of Fair Use”

11:00  Coffee Break

11:15  Panel 6: International Intellectual Property Law

Presenters:  Susan Corbett, Senior Lecturer, School of Accounting and Commercial Law, Victoria
             University of Wellington (New Zealand)
             “Regulation for Cultural Heritage Orphans—Time Does Matter”

             Prof. Patricia Judd, Brooklyn Law School
             “Toward a TRIPS Truce”

             Prof. J. Janewa OseiTutu, University of Pittsburgh School of Law
             “A Sui Generis Regime for Traditional Knowledge”

1:00  Lunch
2:00  **Panel 7: Trademark Law**

Presenters:  Prof. Irene Calboli, Marquette University Law School  
“Protecting Geographical Indications of Origin as Cultural Identity”

Prof. Yvette Joy Liebesman, Saint Louis University School of Law  
“When What You Are Told Is ‘the Law’ Is Not ‘the Law’”

Prof. Lisa P. Ramsey, University of San Diego School of Law  
“Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders”

Prof. Zahr Stauffer, University of Virginia School of Law  
“Embedded Advertising and the Venture Consumer”

3:45  **Coffee Break**

4:00  **Panel 8: Patent Law III**

Presenters:  Prof. Donna M. Gitter, Baruch College  
“The Challenges of Achieving Open Source Sharing of Biobank Data”

Prof. Lars S. Smith, Louis D. Brandeis School of Law, University of Louisville  
“The Role of Exclusive Intellectual Property Rights with Scientific Research”

Prof. Andrew W. Torrance, University of Kansas School of Law  
“Property Rules, Liability Rules, and Patent Rights”

6:00  **Roundtable Adjourns for the Day**

7:00  **Dinner for Roundtable Participants**

Salisbury House  
4025 Tonawanda Drive
ABSTRACTS

Prof. Robert A. Bohrer, California Western School of Law
“The Reverse Doctrine of Equivalents to Limit Reach-Through Claims to Drug Target Patents”

Two years ago I published a short article in Nature Biotechnology arguing that reach-through claims to drug target patents would be a significant improvement in the way that patents affect pharmaceutical policy. Quite simply, the argument was that if me-too drugs are the central problem in the way the current pharmaceutical marketplace works, then giving broad patent rights to the inventor who provides a new target for the pharmaceutical treatment of a disease would drastically limit the introduction of me-too drugs. The argument for price competition benefits for me-too drugs is not strong, however, the stronger argument against broad target patents is that within the population of persons with a particular disease (indication in pharmaceutical terms) there are subpopulations that respond better (either from an efficacy perspective or a safety perspective) to one drug in a class and not to others. The solution to this subpopulation problem can be found in almost all cases by a willingness to apply the reverse doctrine of equivalents. Use of the reverse equivalents doctrine would reward those who can identify a biological difference in a patient subpopulation that would account for the superior efficacy of their drug over the general class and thus provide a “me-different” drug that would not infringe under reverse equivalents.

Prof. Annemarie Bridy, University of Idaho College of Law
“Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement”

At the end of 2008, the music industry ended its five-year campaign of litigation against individual peer-to-peer file sharers and announced that it would be shifting its online copyright enforcement efforts to a model known as graduated response. The most widely publicized form of graduated response is a “three strikes and you’re out” model, in which a user’s Internet access is suspended or terminated by his or her ISP following that user’s receipt of three successive notices of copyright infringement. As it has been presented by entertainment industry trade groups, the enforcement paradigm embodied in graduated response forgoes litigation and statutory mandates in favor of voluntary cooperation between rights owners and Internet access providers—parties that have long been at loggerheads with each other in the war on piracy.

This article seeks to explain, in the context of evolving network management technology and its impact on intermediary liability rules, why the time may be ripe for broadband providers and corporate rights owners to renegotiate their respective roles in the project of online copyright enforcement. Following an analysis of the turn to private ordering and technology-based mechanisms for policing copyrights online, this article proposes a set of principles to guide the implementation of graduated response regimes so that consumers, who have come to rely on uninterrupted Internet access for everything from banking to blogging, do not fall victim to immature filtering technologies and overzealous enforcement.

Prof. Irene Calboli, Marquette University Law School
“Protecting Geographical Indications of Origin as Cultural Identity”

The protection of Geographical Indications of Origin (GIs) has historically been the subject of heated debates. Fierce defenders of GIs, European countries have traditionally advocated that GIs should not be used by unrelated parties because GIs identify unique product qualities and characteristics linked to specific territories. To this claim, the United States and other “new world” countries have generally responded that today most products can be replicated almost anywhere thanks to agricultural techniques, and that many GIs have long been generic terms on their soil. Still, the adoption of the International Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPs) in 1994 marked an
important victory for the European approach by establishing a minimum standard for protecting GIs. Specifically, TRIPs required all signatories to establish minimal protection for GIs, and extra protection for GIs that identify wines and spirits. TRIPs also required its Members to agree to participate in future negotiations to expand this protection. This Article considers whether this expansion may be desirable for the international community and concludes that today a “reasonable” enhanced protection for GIs could be beneficial for economic and agricultural development in most TRIPs countries. This Article also suggests that this expansion could be justified not solely based on the traditional “market approach” analysis of economic gains or loss for Members of TRIPs. Instead, this Article also favors a “reasonable” expansion of protecting GIs as a fundamental and necessary step to protect the cultural identity and diversity of all members of the international community.

Susan Corbett, Senior Lecturer, School of Accounting and Commercial Law, Victoria University of Wellington (New Zealand)
“Regulation for Cultural Heritage Orphans—Time Does Matter”

The regulation of orphan works has stalled in many countries. This is mainly due to the complexity of the issues surrounding these works and the corresponding difficulties of providing a comprehensive legislative solution. Yet the problems created by orphan works affect two distinct categories of secondary users: not-for-profit cultural heritage users and commercial users. This paper argues that the impact of the orphan works problem on cultural heritage institutions and researchers is of immediate concern in New Zealand and other net-copyright importing countries (in which the impact of the problem on the domestic economy is less certain). A partial solution for the cultural heritage orphans must, therefore, not be delayed.

As the paper explains, time is of the essence. The alternative is that other secondary users might have the first opportunity to use the orphan works originating from tardier countries.

Prof. Gregory Dolin, George Washington University Law School
“Addressing Reverse Settlement Problem Through Patent Law”

Over the last few years a new phenomenon emerged in litigation over patents covering pharmaceutical products. This phenomenon would pass largely unnoticed in most other litigation contexts, but in the very specific world of pharmaceutical patent litigation it raised more than a few eyebrows. Indeed, it raised the ire of at least one U.S. Court of Appeals, the Federal Trade Commission, and numerous Senators and Congressmen, as well as spawned a fair amount of academic commentary. The phenomenon I am talking about is settlements between the patent holders and the generic companies challenging the patents. The wrinkle is that unlike most settlements where the alleged trespasser on someone else’s rights settles with that person in order to avoid litigation, in these settlements, it is the rights holder that pays the alleged trespasser. For these reasons these settlements have been termed “pay to delay settlements,” “reversed payment settlements” or simply “reverse settlements.”

Those who perceive these types of settlements to be a nefarious plot by patent holders to continue unwarranted market exclusivity have focused their energy on using the antitrust laws to curtail these activities. The reasoning is that by entering into settlement agreements, patent holders prevent generic manufacturers from entering the market thus raising costs for consumers. This logic is of course predicated on the supposition that absent settlement, generics would be able to enter the market. That, however, is far from certain. After all, in these cases, the brand name drug manufacturers hold a patent that precludes others from making, using, or selling the patented technology, and that absent a conclusive judicial determination such patents remain valid. For this reason, three of the four Courts of Appeals faced with reverse settlements have rejected the antitrust position advanced by the Federal Trade Commission. The fundamental problem with the FTC’s approach is inherent and constant tension
between antitrust law and patent law. Whereas the former seeks to enhance competition by restricting monopolies, the latter seeks to promote competition by granting temporally limited monopolies.

Instead of attempting to fit a square peg of patent problem into a round hole of antitrust law, this Article proposed a different solution that will not unduly discourage settlements, have due regard for competition, and is in line with the original purposes of the Hatch-Waxman Act. The Hatch-Waxman Act sought to promote competition in pharmaceutical products by incentivising generic manufacturers to challenge weak patents and have courts declare these patents to be invalid or unenforceable. Clearing the commons of invalid patents would then spur competition. The Act, however, foresaw that not all of the challenged patents would be declared invalid. This means that settling litigation where a patent is properly issued serves the purposes of patent law, while settling litigation where the patent would have been declared invalid frustrates both goals of the Hatch-Waxman Act (increased competition and “clearing the commons.”) Addressing the problem through antitrust law at best resolves the competition problem, but does little to clear the commons of worthless and improperly issued patents. Instead, the problem should be addressed through patent law itself.

The U.S. Patent and Trademark Office has the authority to order reexamination of any patent at any time there arises a “substantial new question of patentability.” The Patent Act permits “[a]ny person at any time [to] file a request for reexamination by the Office of any claim of a patent on the basis of any prior art . . . .” The Act does not limit submissions to newly discovered prior art. Rather, the person making the submission has to identify for the Patent Office why the identified prior art is relevant and how it casts a “substantial new question of patentability” on the issued patent. This is true even if the PTO has previously considered the art. Additionally, the current version of the Hatch-Waxman Act requires that any generic challenging the validity of a patent under the provisions of the Act provide opinion of counsel identifying the basis for such a challenge to the patentee and the FDA. Finally, the Hatch-Waxman Act requires all parties to a reverse settlement to submit a copy of the settlement to the FTC. Combining these two statutory mechanisms, it is possible to police reverse settlements through patent law.

Reverse settlements should be treated as a signal to the Patent Office that private parties (the patentee and the generic challenger) have some doubts about the strength of the patent at issue. The size of the settlement would indicate whether the doubts are “substantial,” in other words whether there exists in the mind of the parties a “substantial new question of patentability” of the patent in suit. As the settlements get larger, the question of patentability can be viewed to be more and more substantial, and at some point should trigger a reexamination of the patent. If the present law is minimally amended, to require not only that opinion of counsel be shared with the patentee and the FDA but also be filed with the FTC whenever a copy of any reverse settlement agreement is filed, the FTC could then examine the size of the settlement and if need be refer the patent to the PTO for a reexamination. Because the PTO would be in possession of a considered legal opinion identifying potential bases for invalidity, it could proceed to determine whether the identified basis present a “substantial new question” of patentability, and if so proceed to reexamine the patent.

One of the fundamental advantages of the proposed approach is that it does not depend on adversarial litigation or any particular party challenging a patent. Because the PTO conducts its reexamination ex parte upon either its own motion or following a submission from “any person,” the patentee cannot possibly contract away this procedure, unlike the judicial inquiry. Consequently, it would be impossible for the patentee and the generic challenger to collude in order to keep an invalid patent on the market while splitting the supra-competitive profits. The second advantage is that the proposed system closely tracks the goals of the Hatch-Waxman Act. Should the PTO determine that the patent was properly issued it would necessarily follow that the settlement was proper, for the exclusion of the generic would not be the result of an illegal payment, but the result of the scope of a now-confirmed valid patent. Alternatively, should the PTO reject the claims, thus removing the patentee’s ability to enforce a now-non-existent
patent, the market would become open to any other generic manufacturer who wishes to enter it. All that would need to be done is for that manufacturer to file an Abbreviated New Drug Application certifying that no valid patent covering the drug in question exists. Assuming that the generic would be able to satisfy the bioequivalence requirements, nothing would stand in the way of FDA approving the generic version and that version entering the market to the benefit of consumers.

By approaching what is ultimately a patent problem with the proper tools of patent law rather than ill-fitting instruments of antitrust law, we could simultaneously serve the goals of the Hatch-Waxman Act, remove the guess work inherent in post hoc evaluations of patents’ strengths or parties’ ex ante expectations, and promote competition and consumer access to lower cost medications.

Prof. Tonya M. Evans, Widener University School of Law—Harrisburg
“Sampling, Looping and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law”

The United States Constitution directs that Congress regulate copyright and patent laws ultimately to serve human values and social ends by promoting innovation and creativity. Intellectual property law seeks to meet this utilitarian purpose by incentivizing innovators with exclusive rights and economic benefits to encourage further innovation and creativity. To meet this goal, intellectual property laws should be narrowly tailored to achieve this utilitarian goal and to balance the benefit to society with an innovator’s right to exploit her creation.

However, copyright law as currently applied to the medium of music, both the performance embodied in a sound recording and the underlying musical composition itself, fails to meet that constitutional directive. This point is illustrated most clearly in the case of a musical genre like “hip hop” that for decades has relied on the innovative use of existing recordings (most of which are protected by copyright), to create completely new works. Cutting and scratching’, digital sampling, looping and mashing are all integral parts of the hip hop music aesthetic and the hallmark of the type of innovation and creativity born out of the hip hop music tradition.

One of the greatest threats to the constitutional call of Article I, Section 8 to promote science and the useful arts is the stifling effect on innovation by onerous, overly restrictive copyright laws. The per se infringement rule recently articulated in the now legendary hip hop digital sampling case, Bridgeport v. Dimension Films, is but one glaring example of this assertion because, among other reasons, it demonstrates that current copyright law values independent creation at any and all cost without regard to the role of collaboration and custom of borrowing in the performance medium of music generally, hip hop in particular. Additionally, the rule may hearken back to the days of the flawed “sweat of the brow” doctrine developed in wayward lower opinions that attempted to apply the 1909 version of the Copyright Act, which contained ambiguous language regarding the “originality” requirement.

Accordingly, this article examines the deleterious impact of copyright law on music creation. I use hip hop music as an example of a genre significantly and negatively impacted by traditional notions of independent creation and per se infringement of sound recordings.

In Section II, I provide a brief history of hip hop culture from its genesis in the mid-seventies through its transition into the mainstream and the resulting landmark copyright infringement battles in the early nineties. I explore the development of hip hop music a/k/a rap within the culture. Additionally, I highlight the integral and essential aesthetic value to hip hop music of incorporating and looping digital samples of pre-existing works to create new songs. Further, I explore the legal myths within the hip hop culture about the legality of such unauthorized incorporation.
Section III outlines the development of copyright law as applied to music, critiques the independent creation requirement and identifies the defenses traditionally available in copyright infringement cases involving the music and lyrics, which, according to Bridgeport, are not similarly available when infringement of the sound recording is alleged. Additionally, I analyze the per se infringement rule articulated in Bridgeport and explore a recent court’s rejection of the Bridgeport holding in Saregama India Ltd. v. Mosley. Finally, I argue in Section III that copyright law, originally created to apply to text-based copying (books, charts and maps), is not structured ideally in its present form to regulate the creation of music, which has historically been more collaborative than a product of purely independent creation and has been customarily permissive of borrowing.

Section IV expounds further on the negative consequences of applying two separate infringement standards in music copyright cases, one for the underlying music composition and another for the performance embodied in a sound recording in light of the per se infringement rule set forth in Bridgeport.

Finally, Section V considers policies supporting “reverse engineering” in the patent law context to serve as a guidepost for how similar policies could be applied in the copyright context. I suggest that acceptance of such policies might permit greater latitude in the copyright law landscape for the type of unauthorized, but innovative and aesthetically integral, uses of copyrighted sound recordings for which the hip hop genre has become infamous.

Prof. Donna M. Gitter, Baruch College
“The Challenges of Achieving Open Source Sharing of Biobank Data”

Several recent biomedical research initiatives have sought to make their data freely accessible to others, so as to stimulate innovation. Many of these initiatives have adopted the “open source” model that has achieved prominence in the computing industry. With respect to genomics research, open access models of data release have become common and most large funding bodies now require researchers to deposit their data in centralized repositories. In particular, biobanks, which are organized collections of biological samples and corresponding data, often created for the use of investigators who are not affiliated with the biobank, benefit from the implementation of open source principles.

Several obstacles loom, however, as barriers to widespread implementation of open source principles in the field of biomedical research. These include a reluctance among researchers to share the fruits of their efforts; the difficulties of affording informed consent, privacy, and confidentiality to research participants when data is shared so widely; the challenge of crafting an appropriate intellectual property policy; controversy surrounding the issues of commercialization and benefit-sharing; and infrastructure challenges.

Prof. James Grimmelmann, New York Law School
“The Elephantine Google Books Settlement”

The genius—some would say the evil genius—of the proposed Google Books settlement is the way it combines disparate legal areas. It raises important class action, copyright, and antitrust issues, among others. But just as an elephant is not merely a trunk plus legs plus a tail, the settlement is more than the sum of the individual issues it raises. They are, instead, different aspects of a single, overriding issue of law and policy; the settlement offers a new way to concentrate an intellectual property industry.

In this essay, I’ll argue for the critical importance of seeing the settlement all at once, rather than as just a collection of independent legal issues. After a brief overview of the settlement and its history (Part I), I’ll describe some of the larger issues objectors to the settlement have raised, focusing on the trio of class action, copyright, and antitrust law (Part II). The settlement’s proponents have responded with colorable
defenses to every one of these objections; my point is not to enter these important debates on one side or the other, but rather to show that the hunt to characterize the settlement has ranged far and wide across the legal landscape.

Really, truly pinning down the settlement, however, will require tracing the connections between these different legal areas. I’ll argue (Part III) that the central truth of the settlement is that it uses an opt-out class action to bind copyright owners (including the owners of orphan works) to future uses of their books by a single defendant. This statement fuses class action, copyright, and antitrust issues—and we’ll see that it explains a few others, as well. It shows that the settlement is, at heart, a vast concentration of power in Google’s hands, for good or for ill. The settlement is a classcopyrightphant, and we must strive to see it all at once, entire, in all its majestic and terrifying glory.

**Prof. Steven A. Hetcher, Vanderbilt University Law School**

“What Happens When Copyright Takes Tort Seriously?”

When we seek to answer the question raised in the title, at least for what I call Amateur Digital Content, we see: copyright already incorporates a fault standard (contrary to conventional understanding); that this is a good thing (i.e., copyright should not go back to a strict liability standard); that as an implication of these truths, it follows that, first, the burden of proof for establishing fault should shift from defendant to plaintiff, and second, that, statutory and criminal damages should be barred in favor of a regime of real damages only. In short, taking tort seriously leads to a set of integrated and radical conclusions that at a practical level completely changes how we should think about the behavior of amateurs creating digital content.

**Prof. H. Brian Holland, Texas Wesleyan University School of Law**

“Transformative Fair Use Through a Social Semiotic Frame”

This paper argues for the expansion of fair use rights against claims of copyright infringement. Specifically, a social semiotic frame is applied to the concept of “transformativeness”—a nearly dominant factor in the fair use analysis that examines alterations between the initial copyrighted work and the allegedly derivative work—so as to refine our understandings of productive use, added value, purpose and character. After establishing the relatively recent development of the “transformativeness” standard, the paper focuses on gaps and inconsistencies in the doctrine. This discussion reveals a rather narrow focus on modifications to the purpose and character of the work, exacerbated by a tendency to conflate the question of fair use with the availability of copyright protections for derivative-works. Applying a social semiotic frame allows us to step back towards fundamental theories of meaning-making and semantic value, and thus to make the argument that the political and cultural policy rationales of fair use are best realized by moving beyond a narrow consideration of the physical work or the intent of its maker. From this perspective, the “transformativeness” analysis must account for the creation and/or recognition of more expansive cultural meaning in the context of interactions with and about the work. This is where the enrichment of society—the creation of new information, aesthetics, insights and understandings—is best evaluated, as a distinct question standing apart from the creation of new authorial rights in the work.

Although not the subject of my paper, Shepard Fairey’s Obama “Hope” poster is employed throughout to illustrate its thesis. Initially, the AP’s claims against Fairey provide a wonderful example both of the dominant fair use analysis and of the almost intractable difficulty of applying the “transformativeness” standard. I am then able to describe and explain my alternative conception of “transformativeness” by exploring the public’s engagement with Fairey’s work and the multiple meanings produced through that practice. The work is considered not only as a referent to artistic and social movements, but as a semiotic resource, the meaning of which is to be construed by multiple communities with differing codes and conventions. The artifacts of this process are unusually well documented in the discourse of community
leaders before the poster’s release, in the creation of new works (e.g., mash-ups, parodies and satires) that both lionize and criticize, and in post-release comments, grounding my normative claims in vivid examples.

Prof. Patricia Judd, Brooklyn Law School
“Toward a TRIPS Truce”

This Article offers a methodology that intellectual property rights (IPR) producers and consumers, and the nations that represent them, can use to breathe new life into the world’s premier international IPR instrument—the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement, as any treaty addressing the dynamic areas of intellectual property and international trade would, struggles to remain relevant in an age in which the internet is driving rapid technological advances and changing global business. However, the struggle is not in vain. This Article shows how a recent TRIPS dispute settlement case, involving a key provision of the famed TRIPS enforcement text, interprets that text in a way that increases the Agreement’s ability to adapt to a changing world. Furthermore, the Article encourages stakeholders on both sides of the IPR debate to use these newly-delineated and affirmed flexibilities to achieve their respective goals for the Agreement. Looking beyond the obvious implications of the decision, the Article argues that the case can serve as a starting point for significant change in the stereotypical, entrenched relative positions of IPR stakeholders on both sides of the negotiating table, all of whom have been given the tools necessary to interpret the Agreement’s most trailblazing sections in unexpected and creative ways.

Prof. Megan M. La Belle, Columbus School of Law, Catholic University of America
“Patent Litigation, Personal Jurisdiction, and the Public Good”

Validity challenges asserted in litigation currently serve as the primary gatekeeper of patent quality. When an alleged infringer’s validity challenge is successful, the intellectual property enters the public domain thus creating a “public good.” Validity challenges asserted in declaratory judgment actions—as opposed to those raised in defense to infringement claims—can be particularly effective at invalidating bad patents because the alleged infringer chooses the forum and controls the timing of the suit. Yet declaratory relief actions make up a surprisingly small percentage of the total number of patent cases. This Article argues that one reason so few declaratory judgment actions are filed is because of a longstanding but incorrect jurisdictional doctrine that precludes many alleged infringers from seeking declaratory relief in a convenient forum—the Federal Circuit’s categorical rule that patent holders will not be subject to personal jurisdiction based on cease-and-desist letters sent into the forum state. The Article critically examines and rejects various possible justifications for that doctrine, ultimately demonstrating that it is both legally unsound and contrary to public policy.

Prof. Yvette Joy Liebesman, Saint Louis University School of Law
“When What You Are Told Is ‘the Law’ Is Not ‘the Law’”

In the United States, Americans venerate the Rule of Law to a greater extent than in most of the world. Through crisis after crisis, the courts and the public value its importance, even when it has been tested in a crucible. As Justice O’Connor noted in Hamdi v. Rumsfeld, in affirming the Guantanamo detainee’s right to due process, it is during our most challenging and uncertain moments that America’s commitment to the rule of law is most severely tested, and when it is most important that it be preserved.

However, erosion of national respect for the Rule of Law may be coming from an unlikely source, and could not be farther from legal. Corporations have increasingly published false statements of “the law,” to facilitate compliance, deflect criticism from their internal policies or fraudulently for pecuniary gain. This
article grapples with the damaging effects that these actions could have on our view of both government and “the law,” and possible remedies to prevent these actions.

Prof. Alina Ng, Mississippi College School of Law
“Is There a Right to Access?: Of Authors, Publishers, and Users”

There are two fundamentally conflicting views of copyright law as an institutionalized set of rules to promote progress. The first depicts the copyright system as a set of economic incentives to encourage production and dissemination of creative works. The second depicts the same system as facilitating monopolistic controls, which hampers society’s ability to obtain creative works. These two depictions of the copyright systems fundamentally conflict to the extent that economic incentives may be used as an absolute right to exclude society from using the work. Exercises of exclusive control to prevent legitimate uses of the work will always cause the incentive paradigm of the copyright system to be challenged. But, the idea that the public has the right to access creative works appears to be a more recent phenomenon stemming from a perceived right of society to access knowledge and information contained in literary and artistic works. Here, I explore the emergence of a general right to access private property, and question whether such a right exists within copyright jurisprudence. A tentative conclusion to my question is that no such right exists as a legal entitlement for society to access creative works for the purposes of progress.

Prof. Chidi Oguamanam, Dalhousie Law School (Canada)

In this presentation, I chart the global landscape and constellating regime framework for access and benefit sharing (ABS) over genetic resources (GRs) innovation. The implicated regimes include environmental, intellectual property, human rights and indigenous knowledge. I also examine the underlying politics of ABS that has pitted users and providers of GRs, corresponding to developed and developing countries. I link the hitherto limited discourses on ABS that has focused mostly on plant and animal GRs to biotechnology’s interest in those realms. I argue that such limited interest accounts for the current narrative of the global ecological profile which highlights both the pre-eminence and marginalization of indigenous bio-cultural knowledge, especially in animal and plant GRs realms. I draw attention to the current attraction of biotechnology to MGRs, and speculate on its implication for the ongoing policy and legal debates over ABS.

Prof. J. Janewa OseiTutu, University of Pittsburgh School of Law
“A Sui Generis Regime for Traditional Knowledge”

International discussions about traditional knowledge have been ongoing for several years without significant progress. This may partially explained by the characterization of traditional knowledge as a developing country matter and intellectual property as protecting developed country goods. Various scholars have observed that traditional knowledge can be partially protected under intellectual property law but that the existing system fails to adequately protect this know-how. This has led to proposals for a sui generis regime for traditional knowledge. In light of developing country concerns about some of the negative societal effects of intellectual property rights, this paper draws on the works of Professors Drahos and Chon and uses an instrumentalist approach to assess the implications of a sui generis traditional knowledge right ‘from below.’ I conclude that some of the measures sought may not be consistent with the desired outcome.

Prof. Eftthimios Parasidis, Saint Louis University School of Law
“A Uniform Framework for Patent Eligibility”
Patent doctrine has been plagued by a prolonged state of ambiguity. Given the rapid pace of advancements in emerging technologies such as biomarkers, stem cell therapies and gene sequences, there is an immediate need for clarification of the law surrounding subject matter that is eligible for patent protection. Coupled with the active role the Supreme Court has taken in examining this precise issue, individuals and non-profit organizations have galvanized a public discourse through constitutional challenges to the issuance of various biotechnology patents. Despite a statutory framework that has remained constant since 1793, courts have been unable to create a uniform test for determining patent-eligible subject matter that veraciously embodies the legislative intent and constitutional mandate underlying the patent laws and is applicable across all technologies. I argue that the proximate cause of the lack of a uniform framework is the failure of courts to adequately define the statutory categories and the absence of a technology-agnostic method of analyzing whether an invention claims ownership over a product of nature. This paper establishes a new framework that addresses patent-eligible subject matter by accurately characterizing the statutory categories and creating a methodological approach to outlining the concepts encompassed by the product of nature doctrine. The advantages of this methodology are highlighted through the application of the new framework to traditional inventions and emerging biotechnologies.

Prof. Lisa P. Ramsey, University of San Diego School of Law
“Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders”

Trademark infringement law may apply to the unauthorized use of trademarks to impersonate markholders on social network sites and elsewhere. Where “brandjacking” causes confusion about the source of information, that expression may be infringing even where the imposter is not creating confusion about the source or quality of commercial products for sale. Courts are generally more likely to find actionable likelihood of confusion in cases involving uses of marks in noncommercial or mixed noncommercial-commercial expression where the accused infringer is using the mark to impersonate the markholder. Trademark law should ban unauthorized uses of marks that cause confusion regarding the source of expression, but only where reasonable persons believe this false statement of identity and authorship and the content of the expression does not dispel this source confusion. Confusion as to whether the markholder is affiliated with or sponsors the expression should not be actionable.

Zvi Rosen, Esq.
“Copyright, Advertising, and Unfair Competition”

It has been suggested several times that advertisements and labels are not within the proper subject matter of copyright, both in the nineteenth century and in modern times. This work reviews both historical and modern approaches to this discussion, with a particular focus on the “progress” clause of the intellectual property clause in historical context. From reviewing this record the better view is that such media is not copyrightable, and a more proper protection is in the nature of unfair competition law. However, it is not clear that this is far from the current state of things, past and present. The modern doctrine of fair use and its historical antecedents, as applied to advertisements and labels, already molds the copyright protection of labels and advertisements to a form of unfair competition law.

Prof. David Schwartz, Chicago-Kent College of Law
“Doctrinal Displacement at the Federal Circuit”

This article proposes and empirically tests two related theories of adjudication—doctrinal reallocation and doctrinal displacement. According to the theory of doctrinal reallocation, a substantive doctrine may become more important following a shift in adjudicative control over that doctrine, for example, through reallocation of the decision-making authority over a doctrine from a jury to a judge. Doctrinal displacement states that a change in the importance of a doctrine may in turn decrease the importance of
another, typically related, doctrine. This article tests these theories by applying them within the context of patent law. Doctrinal reallocation and displacement occurred in the aftermath of two en banc Federal Circuit decisions: *Markman v. Westview Instruments* and *Cybor v. FAS Techs., Inc.* These decisions increased judicial control over the claim construction doctrine. Empirical evidence supports the hypothesis that claim construction became more important, and a related doctrine known as “the doctrine of equivalents” was displaced shortly after these decisions. While this article’s empirical results suggest the presence of these twin forces, further study is necessary to determine whether other areas of the law experience similar phenomena.

**Prof. Ted Sichelman, University of San Diego School of Law**

“Do Economic Downturns Dampen Patent Litigation?” (with Alan Marco, Department of Economics, Washington & Lee University)

Previous studies have shown a statistically significant increase in the rates of total federal civil litigation as well as bankruptcy and employment litigation following economic downturns. However, nobody has examined the effects of downturns on patent litigation, a field in which there are widely held competing views. One camp argues that patent litigation should increase, because potential plaintiffs have a greater incentive to squeeze patent assets for their full value. The other camp posits that low free cash flow and available capital leads to less litigation.

Analyzing quarterly patent infringement suit filing data from 1970-2009 through a variety of statistical methods, this article shows that economic downturns may both increase and decrease patent litigation. Specifically, increases in GDP and consumption are correlated with significant increases in patent litigation, leading to countercyclical trends. On the other hand, increases in stock market indices and declines in interest rates, financial risk, and unemployment are correlated with significant decreases in patent suits, leading to cyclical trends. Thus, both theories of economic downturns and civil litigation are at work in the patent arena. Whether patent litigation increases or decreases following a given downturn depends on the specific nature on the downturn.

**Prof. David A. Simon, Concordia University Chicago**

“Reasonable Perception and Parody in Copyright Law”

When the Supreme Court decided that parodies should be given protection under the doctrine of fair use, it attempted to chart a clear course through the waters that had eddied since it last sailed through them forty-three years earlier. In the process, the Court sailed its ship in three primary directions, making the same number of holdings. First, a parody is a type of work entitled to fair use protection. Second, a work qualifies as a parody when it can “reasonably be perceived” as such. Finally, a work’s status as a parody is not determinative of whether it is fair: courts still must analyze the work using the § 107 fair use factors.

Despite the Court’s navigational guidance, the parodic sea still whirls with judicial uncertainty: noticeably absent from the Court’s decision and subsequent lower court decisions are methods for determining what can “reasonably be perceived” or who reasonably perceives the work. No one has systematically examined how lower courts have applied the “reasonably perceived” test, or how courts have used a finding of parody to inform their fair use analyses. This Article examines these issues and suggests that the Supreme Court failed to adequately articulate the foundational elements of this test, causing lower courts to apply the test in variety of ways. Paradoxically, however, this analysis shows that, after finding a parody existed, courts have been fairly uniform in their fair-use factor analyses.

If the first part of this Article reveals a stormy and poorly charted judicial sea, the second part proposes a new course by articulating a new reasonable perception test and modifying the subsequent fair use analysis. This test is built by deconstructing the current framework for analyzing a parody and then
framing it in terms of reasonable perception. This also removes any factor-based analysis for parodic works. Deconstructing and then reconstructing the inquiry this way allows courts to apply the parody doctrine with greater accuracy and consistency. It also anchors the parody inquiry, keeping the judicial ship close to parody’s doctrinal dock.

Alexandra Sims, Senior Lecturer, Department of Commercial Law, University of Auckland (New Zealand)
“Appellations of Piracy?: Fair Use’s Prehistory”

In 1839 Justice Story first introduced fair use to United States copyright law in *Gray v Russell* when he adopted the English jurisprudence of ‘fair dealing’. The English courts had begun their development of fair dealing in 1740 by finding that abridgments—the condensing of a longer work into a shorter and often more readable work, not simply a scissors and paste version—did not infringe copyright. The English courts’ overriding aim in creating the fair dealing exceptions was to ensure the widest possible dissemination of information while still offering sufficient protection to authors. By 1839 there was considerable confusion in England over the status of abridgments. The United States courts, unencumbered by history, ensured that abridgments were not protected by fair use. Yet the US courts in their development of fair use have remained more true to the English courts’ original conception of fair dealing.

Prof. Lars S. Smith, Louis D. Brandeis School of Law, University of Louisville
“The Role of Exclusive Intellectual Property Rights with Scientific Research”

In light of the important public policy concerns with respect to global climate change research, what is the role of exclusive rights granted by intellectual property? That is, is it appropriate to grant exclusive rights via patent, copyright and trade secret to researchers in their respective research. In particular, given the recent challenge to the Climate Research Unit at the University of East Anglia about the quality of the data and algorithms used to process that data, there is an important question about the role that IPRs play in the process of producing and disseminating such research. For example, it is alleged that issues of confidentiality were raised by the researchers to deny Freedom of Information requests.

This paper takes no position on the underlying dispute, but seeks merely to assess the role the IPRs play in academic and scientific research, and the ability of other researchers to review and test such science. Most universities have intellectual property policies, and this paper will examine the propriety of such policies in light of the importance of research regarding such issues as global climate change. Particular focus will be on the role of trade secrets, and the effect of university IPR policies that encourage patenting, and thus delay of disclosure of research to protect the patentability of any inventions.

Prof. Ned Snow, University of Arkansas School of Law
“Forgotten Facts of Fair Use”

Issues of fair use in copyright cases are usually decided at summary judgment. But it was not always so. For well over a century, juries routinely decided these issues. The law recognized that fair use issues were highly subjective and thereby inherently factual—unfit for summary disposition by a judge. Today, however, all this has been forgotten. Judges are characterizing factual issues as purely legal so that fair use may be decided at summary judgment. This practice contravenea a history of fair use that precedes and informs the Bill of Rights, suggesting that judges are now violating the Seventh Amendment right to a jury.

Prof. Zahr Stauffer, University of Virginia School of Law
“Embedded Advertising and the Venture Consumer”
Embedded advertising—marketing that promotes brands from within entertainment content—is a thriving, rapidly changing practice, the market for which may exceed $10 billion in 2010. The relatively few legal scholars who have studied embedded advertising believe that it is ineffectively regulated, and harmful because it creates ‘hyper-commercialism,’ distorts consumers’ tastes, taints the artistic process, and erodes faith in public discourse. This Article argues that the critics are wrong. Sponsorship disclosure law under the Communications Act of 1934 is indeed ineffective, because the media industry has consolidated considerably and because media content is now created and consumed in diverse ways unimaginable to the drafters. But the kinds of regulatory reforms under consideration by the FCC itself will do more harm than good. Expanding embedded advertising regulation would impose significant costs without producing corresponding benefits for consumers: doing so would reduce or eliminate embedded advertising’s almost uniformly ignored benefits. Embedded advertising has the capacity to subsidize high-quality creative works, diversify the market, improve marketing content, and minimize waste in the industry. Consumers are better off if the sponsorship disclosure regime is allowed to slide into irrelevance than if it is expanded in scope and form through more prominent and repetitive disclosures.

Prof. Andrew W. Torrance, University of Kansas School of Law
“Property Rules, Liability Rules, and Patent Rights”

In their seminal 1972 article, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, Guido Calabresi and A. Douglas Melamed proposed an analytic framework for comparing entitlements protected by property rules, liability rules, and inalienability rules. The influence of this theoretical framework has permeated legal scholarship, extending well beyond tort and property law into doctrinal areas such as corporate, securities, contract, criminal, and intellectual property law. To use the nomenclature of Calabresi and Melamed, the United States’ patent law has recently witnessed a shift away from property rules (for example, injunction) and towards liability rules (for example, damages). This study involves the design and use of an experimental approach to test directly the hypothesis that amounts of innovation, productivity, wealth, and other social amenities vary across patent systems that tend to emphasize relief for infringement via either property rules (that is, availability of injunctive relief) or liability rules (that is, availability of damages). Through the particular lens of intellectual property law, this study offers the first experimental test of the general Calabresi-Melamed hypothesis that property rules and liability rules should yield differential outcomes.

Prof. Greg R. Vetter, University of Houston Law Center
“Patent Law’s Unpredictability Doctrine & the Software Arts”

Software’s characteristics engender controversy within patent law, such as when it is statutory subject matter under 35 U.S.C. § 101, the gateway doctrine that sweeps from patent eligibility claims that are too abstract. Eligibility, however, is only one of five requirements for a valid patent claim. Another, the disclosure requirement, by which I primarily mean enablement, needs fresh thinking for software patents: that the doctrine of unpredictability, originating in the chemical and biotechnology arts, should inform enablement in the software arts. In an unpredictable field, enablement’s disclosure sufficiency doctrine becomes more stringent. Courts’ application of the disclosure requirement for software patents has been lax. Part of this laxity is insufficient understanding of the degree to which software products and systems, and their information technology ecology, can be unpredictable. Once such unpredictable possibilities are understood as a matter of potential fact and as patent law doctrine, the unpredictability rubric should inform evaluation of a software patent’s disclosure. Moreover, a recognized software arts unpredictability doctrine may influence the issues of patent quality for business methods implemented with software.

Prof. Julie Cromer Young, Thomas Jefferson School of Law
“Death Plus Seventy: Copyright in Memoriam”
An omnipresent, though often overlooked, art form is the memorial. From ancient Egyptian pyramids to modern cemeteries, people have used sculpture to celebrate lives well lived and to mourn those lives too soon lost. These monuments can be on a small scale, such as individual gravestones, or on a large scale, such as the Lincoln Memorial. Some are tributes to events, eras, or peoples. Regardless of size or purpose, memorials stand as silent sentinels to those they commemorate, existing for the most part until elements or humans take their toll.

In some cases, these changes to the landscape are willful. In Germany, for example, cemetery plots are not purchased, but leased, and all but a few of the ornate headstones are removed and discarded in a heap when the lease comes to an end. In California, the display of a large cross as a tribute to American veterans has sparked a decade-long debate over religion in government, with many citizens and courts calling for its removal. And Senegal’s recently-unveiled Monument to the African Renaissance, taller than the U.S. Statue of Liberty, is drawing sharp criticism regarding the depiction of an African woman—one hand, because she demonstrates complete subjugation to a man; on the other, because her state of dress (or lack thereof) does not accurately depict the Senegalese Muslim culture. The artist has already suggested draping the woman in clothes to help quell critics.

At first blush, one might assume that these changes are and should be in the discretion of the owner of the geographic location where the monument rests. After all, when viewed from a “speech” standpoint, the art represents the property owner’s speech. However, many of the artists of memorials actively claim copyright protection in them. In the United States, several copyright registrations exist for headstones and tombs. Sculptor Felix De Weldon claims copyright in several public works, including the Iwo Jima Memorial. Some memorials themselves are copyright owners; the Australian War Memorial claims copyright in its website and all items in its National Collection. In Egypt in 2007, a bill was introduced that attempted to assert national copyright over all pyramids and the Sphinx. While it initially received much attention as being contrary to the Berne Convention, that bill is still pending.

Memorials, forming a quiet component of a living landscape, invite infringement. Even before digital distribution escalated the capability to create and copy, these monuments were infringed often in the form of photographs, miniature reproductions, and outright copies. While public, these works are not in the public domain. Many are works for hire, but many are not. If the artists or their heirs use copyright tools such as termination of transfer, moral rights, and antiquities laws to recapture or preserve lawful private rights in public memorials, the living landscape as we know it may come at a price.

This paper examines the current legal state applicable to monuments and memorials. It considers copyright, moral rights, antiquities, and other legal regimes that could apply to help or hinder access to already public works. Additionally, it considers the hypothetical of applying those laws to legal conclusion, determining whether ultimately, the ability of the artist to exercise rights over the monument would diminish the public domain by disallowing derivative access to those works, or expand the public domain by preventing any alteration to their intended display.

Prof. Peter K. Yu, Drake University Law School
“The Graduated Response”

In the past few years, the entertainment industry has deployed aggressive tactics toward individual end-users, online service providers, and other third parties. One of the latest proposals that the industry has been exploring is the so-called “graduated response” or “three strikes” system, which threatens to suspend the service of internet users after they have received two warnings from their ISPs about potentially illegal online file-sharing activities.
In December 2008, the RIAA made a formal public announcement of its change of focus toward greater cooperation with ISPs. This new collaborative effort seeks to replace the highly unpopular lawsuits the industry has filed against individual file-sharers in the past five years. To strengthen their legal positions, and to induce greater cooperation from ISPs, some industry groups have suggested that the graduated response system had been built into the framework under the Digital Millennium Copyright Act of 1998—a proposition that had been vehemently rejected by ISPs, civil liberties groups, consumer advocates, and academic commentators.

This paper explores the system’s effectiveness in addressing massive online copyright infringement. It then examines whether the system has been built into the so-called DMCA framework and highlights the problems and unintended consequences brought about by the system. The paper concludes by outlining six basic principles policymakers need to take into account if they choose to institute such a system despite its many shortcomings.