2011 Intellectual Property Scholars Roundtable
Drake University Law School

FINAL PROGRAM

FRIDAY, APRIL 1, 2011

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. Liam O’Melinn, Ohio Northern University Pettit College of Law
Stealing from the Public: Private Domains and Public Burdens

Prof. Eric A. Priest, University of Oregon School of Law
“Copyright, Scholarship, and the ‘Harvard’ Open-Access Policy”

Jenny Lynn Sheridan, Columbia University School of Law
“Rise of Property Rights Theory Swallows up Traditional Copyright Privileges of First Sale and Fair use”

Prof. Joseph A. Tomain, University of Louisville School of Law
“Uncertainty: Fair Use and The Grateful Dead”

11:15  Coffee Break
11:30 | Panel 2: Trademark Law
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Presenters: | Prof. William K. Ford, John Marshall Law School
| Raizel Liebler, John Marshall Law School
| “Games Are Not Coffee Mugs: Games and the Right of Publicity”
| Prof. Leah Chan Grinvald, Saint Louis University School of Law
| “ACTA’s Trademark Implications”
| Prof. Doris Estelle Long, John Marshall Law School
| “Territoriality, Sovereignty and Well-Known Marks: Time to Reconsider the Concept of ‘Uni-torriality’?”

1:00 | Lunch

2:00 | Panel 3: Technology Law I
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Presenters: | Prof. Thomas C. Folsom, Regent University School of Law
| “Recoding IP Law for New Technological Uses: IP in 4D (or Can It Be Simply That Plagiarism Is Piracy Is Predatory Is Prohibited?)”
| Prof. Ira Nathenson, St. Thomas University School of Law
| “Best Practices and the Law of the Horse: Teaching Cyberlaw Through Role-Playing Simulations”
| Prof. Jon Garon, Hamline University School of Law
| “Revolutions and exPatriots: Social Networking, Ubiquitous Media and the Disintermediation of the State”

3:30 | Coffee Break

3:45 | Panel 4: Copyright Law II
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Presenters: | Prof. Timothy K. Armstrong, University of Cincinnati College of Law
| “Everyone’s an Archivist: Rights, Roles, and Access to Knowledge in a Digital Age”
| Prof. H. Brian Holland, Texas Wesleyan University School of Law
| “Social Semiotics, Originality and Authorship in Copyright Law”
| Prof. Alina Ng, Mississippi College School of Law
| “Authentic Authorship”
| Dr. Nic Suzor, Lecturer, Law School, Queensland University of Technology (Australia)
| “Examining Scarcity: Incentives, Access, and the Quality of Progress”

6:00 | Roundtable Adjourns for the Day

7:00 | Dinner for Roundtable Participants
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Salisbury House
4025 Tonawanda Drive
Saturday, April 2, 2011

9:00 Breakfast

9:30 Panel 5: International Intellectual Property Law

Presenters: Prof. Llewellyn Joseph Gibbons, University of Toledo College of Law
“Hoisting the Jolly Roger and Lowering Intellectual Property Protectionism in Developing Countries”

Prof. Giuseppe Mazziotti, University of Copenhagen, Faculty of Law (Denmark)
“Managing Online Music Rights in the EU Digital Single Market: Current Scenarios and Future Prospects”

Nahoko Ono, Graduate School of Law, Hitotsubashi University (Japan)
“Crossroads of Patents and Copyrights—From Secured Transaction Perspective”

Prof. Janewa Osei Tutu, University of Pittsburgh School of Law
“Value Divergence in Global Intellectual Property Law”

11:15 Coffee Break

11:30 Panel 6: Technology Law II

Presenters: Prof. Derek E. Bambauer, Brooklyn Law School
“Orwell’s Armchair”

Prof. Robert A. Heverly, Albany Law School
“Breaking the Internet—International Efforts to Play the Middle Against the Ends: A Way Forward”

Prof. Jane Yakowitz, Brooklyn Law School
“Privacy Chaff”

1:00 Lunch

2:00 Panel 7: Patent Law

Presenters: Sarah Burstein
“Design Patents Are Not Combination Patents”

Prof. Chester Chuang, Golden Gate University School of Law
“Offensive Venue: An Empirical Analysis of Requests for Declaratory Relief in Patent Cases”

Prof. Lucas Osborn, Campbell University School of Law
“Instrumentalism at the Federal Circuit”

Prof. Joshua Sarnoff, DePaul University College of Law
“The Patent System and Climate Change”
4:00 Roundtable Adjourns for the Day

7:00 Dinner for Roundtable Participants

The Des Moines Club
666 Grand Avenue
COMMENTATORS

- Prof. Shontavia Johnson, Drake University Law School
- Prof. Patricia Judd, Brooklyn Law School
- Prof. Liao Zhigang, Law School, Southwest University of Political Science and Law (China)
- Zvi Rosen
- Prof. Karen E. Sandrik, Florida State University College of Law
- Prof. Greg R. Vetter, University of Houston Law Center
- Prof. Mary W.S. Wong, University of New Hampshire School of Law
- Prof. Xie Huijia, South China University of Technology Law School (China)
ABSTRACTS

Prof. Timothy K. Armstrong, University of Cincinnati College of Law
“Everyone’s an Archivist: Rights, Roles, and Access to Knowledge in a Digital Age”

Libraries, like other intermediaries in the information ecosystem, have found their historical identities and missions increasingly challenged by advancing technologies. As libraries adopt varying strategies to adapt to new distribution technologies and fluctuating user expectations, one tool on which they have long relied to perform their missions—a set of specialized statutory exemptions from liability for copyright infringement—is failing to keep pace. Just as prior changes in technology have prompted revisions of the copyright statute to protect libraries, archives, and other knowledge institutions, so too has the rise of the networked information economy sparked new calls for statutory reform.

The two most thoughtful and carefully considered reports that have been issued to date on the revision of the library copyright exemption, however, both suffer from a shared flaw: they ignore the extent to which networked communications technologies enable individual or group action to substitute for institutional action. The Internet has been a force for disintermediation and leveling of hierarchies, effects that have been felt across a broad array of productive domains. The same effects are already being felt in areas historically connected with libraries, such as the distribution and archiving of knowledge, with peer-driven projects such as Wikipedia and Project Gutenberg performing similar functions outside any previously existing institutional structure. By overlooking one of the most salient characteristics of the emerging networked information economy, recent calls for revision of the library copyright exemption jeopardize their own relevance.

To maximize its effectiveness, statutory reform aimed at bringing the library copyright exemption into the digital era should focus upon providing protections for the kinds of activities Congress wishes to foster, such as digital distribution or preservation of works, irrespective of whether those activities are undertaken by libraries or others. What is presently an exemption available only to specific kinds of institutions, in other words, should be broadened to include activities undertaken by the public at large where those activities serve the same social ends historically associated with libraries and archives.

Prof. Derek E. Bambauer, Brooklyn Law School
“Orwell’s Armchair”

Direct regulation of Internet content is constrained in democratic countries by protections for freedom of expression. The United States in particular saw initial statutory efforts to limit indecent or offensive content rebuffed on First Amendment grounds. Current scholarship regards legal restrictions in America on on-line information as unlikely to survive challenge; thus, censorship has largely been defeated. This Article argues, though, that governments retain powerful tools to achieve content-limiting ends, and that they are increasingly likely to deploy such measures to combat fears of intellectual property infringement, proliferation of pornography, incitement to violence by terrorists, and cybersecurity threats. The censor’s toolbox contains more than law. The proliferation of filtering through code, social pressures, public-private agreements, and selective funding raises hard questions about whether government is prevented from interfering with Internet speech, or only blocked from certain means of doing so. The Article examines various responses to these problems, ranging from constitutional measures (such as the doctrine of unconstitutional conditions) to structural steps (such as network neutrality) to governance (such as devolving responsibility to institutions like ICANN). It concludes by assessing how indirect censorship, particularly that which appears voluntary or optional, offers broader lessons about the interplay between technology, governments, intermediaries, and public law.
Sarah Burstein
“Design Patents Are Not Combination Patents”

In *KSR v. Teleflex*, the Supreme Court revived the concept of “combination patents” and indicated that such patents should be given careful scrutiny under § 103. The Court stated that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” The Supreme Court did not discuss design patents in *KSR* and the Federal Circuit has not yet considered whether it needs to modify its current tests for design patents in light of *KSR*. However, there is some suggestion in case law and commentary that the Supreme Court’s combination patent analysis could—or even must—be applied to design patents.

This Article argues that design patents should not be analyzed as combination patents. As an initial matter, the Supreme Court’s combination patent analysis is so grounded in the concept of increased functionality that it is difficult—if not impossible—to translate into the context of designs, which do not protect increased functionality. More importantly, the Supreme Court’s rationale for urging caution in the analysis of combination patents does not apply to designs, because granting patents for designs that combine pre-existing design elements does not bar other designers from using those elements in their own designs. Therefore, it is not necessary to exclude such designs from patentability, or even to subject them to close scrutiny. Also, as the Federal Circuit has recognized in past cases, even if a design may be described as being a “combination” of design “elements” known in the prior art, it does not follow that any particular combination would have been obvious to an ordinary designer ex ante. Thus, the issue of whether or not a design may be considered a “combination” is not particularly relevant to the ultimate inquiry under § 103.

Prof. Chester Chuang, Golden Gate University School of Law
“Offensive Venue: An Empirical Analysis of Requests for Declaratory Relief in Patent Cases”

Parties uncertain of their legal rights can seek judicial determination of those rights under the Declaratory Judgment Act. Declaratory relief is particularly important to potential patent infringers who may feel threatened by a patentee or who want to know if their activities infringe upon another’s patent. Approximately 14% of patent cases that reach trial are declaratory judgment actions brought by a potential infringer and studies have demonstrated that potential infringers who file for declaratory judgment, rather than waiting to be sued by the patentee, have a significantly higher chance of winning at trial. Given the high cost of patent litigation, it is important to understand what motivates potential infringers to preemptively file a lawsuit for declaratory relief. This study examines all declaratory judgment patent complaints filed in 2008 and identifies commonalities between them. This study has found that motions to transfer are filed in a significant percentage of declaratory judgment cases, and that motions to transfer are more likely to be filed in declaratory judgment cases than patent infringement cases. Also, in many cases, the action for declaratory relief was filed after a substantially similar case had already been filed by the patentee in another court. This suggests that many declaratory judgment suits are filed as a forum shopping tactic. But this study further found that it is a tactic that does not work well. If there was a motion to transfer filed in a declaratory judgment case, the declaratory judgment case would usually be transferred, or dismissed in light of a co-pending case. This paper explains the study, its methodology and results.

Prof. Thomas C. Folsom, Regent University School of Law
“Recoding IP Law for New Technological Uses: IP in 4D (or Can It Be Simply That Plagiarism Is Piracy Is Predatory Is Prohibited?)”

“It is evident that as rights are strengthened, they need run, and can be endured, only for a correspondingly shorter period.” — Benjamin Kaplan
Professor Kaplan’s observation: our ability to endure copyright is a function of (a) the intensity of the rights and (b) their duration, can be extended from copyright to all of intellectual property. Moreover, his observation can be extended beyond his two parameters into at least four dimensions. These four are subject matter scope, zone of protection scope, public domain preservation/penetration scope, and duration. Beyond these four dimensions is a kind of string theory set of other factors, chief of which is the phenomenon of multiple co-existing and contradictory normative and economic rationales for intellectual property, and the additive effect of the convergence of patent, copyright, and trademark coverage for the same “object.” All of these are exacerbated by the specter of secondary liability especially in connection with new technological uses.

In this article, I propose a 4D graphical representation of this data. Such a view clearly illustrates that an increase or decrease along any of four dimensional axes leads to a net change, not merely by the linear unit, nor by the planar area, but by a volumetric mass. There has been, is now, and probably will continue to be strong pressure to expand IP in each of at least four dimensions, expanding outward from a core that is more or less certain to a much less certain and far more problematic edge. The cases at the edge, frankly, have little to do with what historically, logically or legally fit the definition of intellectual property but instead comprise an astonishing variety of bad poetry and ersatz policy, with some occasional solid hunches as well. Within that odd frontier on the edge, there is some conduct that probably ought to be regulated, and some activities that perhaps ought to be incentivized, somehow, but according to an explicitly remixed law that is at once more coherent, practical and predictable than present law.

As reconceptualized, the generic body is embodied Intangible Products of the Mind (IPM). The familiar correlative terms, Intellectual Property and Intellectual Property Rights (IPR), comprise one category of such products, but IPR should be limited to the core of each IP discipline. Another distinct term, Intellectual Activity Rights (IAR), designates the edge or frontier. These two co-existing regimes—Intellectual Property and Intellectual Activity—can be plotted on a single combined four dimensional chart to show a solid core of Intellectual Property Rights at the center with Intellectual Activity Rights radiating from that core and ultimately defining a frontier both at the inner and outer edges of the Intellectual Activity band; a first frontier where IA borders IP at the inner edge of IA, and a second frontier where IA borders the public domain at the outer edge of IA.

The consequences of this four dimensional view coupled with recategorization of the existing doctrines include: an ability better to articulate recurring patterns both in ancient doctrine and recent cases; an unexpected revelation of an anti-plagiarism instinct that constitutes both a de facto hidden standard and also a predictive rule of thumb; and a radical yet modest proposal for reform. A biopsy of the existing mix of various Intellectual Property rights at the core intertwined with Intellectual Activity Rights reveals within it a growing mass of overlapping and oddly growing materials combining a benign, designed, organic development of core IP doctrine with some accidental, unplanned, and cancerous accretion of IAR. Some of the accretion may, in fact, be desirable but the current uneasy, unarticulated, contradictory, and probably unauthorized evolution or metastasis of doctrine cannot be the right way to handle it. I propose to remix the laws relating to current IP by purposefully re-categorizing and deliberately redesigning its course of development.

So understood, it is more likely that the core of Intellectual Property Rights surrounded by a deliberately designed set of cooperating Intellectual Activity Rights might actually aid in promoting the progress of science, the useful arts, or whatever else might be preferred in addition to, or instead of those. It is important to do this, especially in connection with new technological uses.
The right of publicity protects individuals from the unauthorized commercial exploitation of their identities. Should games be judged differently than other expressive mediums when it comes to this right? For approximately four decades, the dominant approach of the courts made games less resistant to right of publicity claims than more traditional mediums of expression, such as magazines, books, films, and television programs. *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* upset the view that “licensing [is] the settled order of things” when it comes to games. But uncertainty remains about how much flexibility game producers have to incorporate individuals into games without their consent. Commentators and courts are resisting a further weakening of the right of publicity beyond what C.B.C. accomplished. Some commentators think C.B.C. itself went too far. We argue that the value of free expression outweighs the norm of licensing, meaning that the uncertainty in this area of the law should be settled in favor of games usually being treated in the same way as more traditional mediums of expression.

Unlike any prior era in history, modern technology allows émigrés and refugees to participate in the cultural political life of their homeland at unprecedented levels. These expatriates may form communities focusing on the land they have left, vote in elections in their homelands, and participate in the economic life of their former state. As a result, in politics, commerce and community, the Twentieth Century role of the state has been challenged by new technologies that reduce barriers among states and improve communications among communities.

Nowhere has this transformation been greater than in the Middle East of 2011, a region shaped by arbitrary, Empire-Age political expediency and under tremendous popular pressure to redefine itself. But these transformations are not merely the populist uprisings of Tunisia and Egypt; they can be seen in economic transformations of Asia and economic harmonizations within both Europe and North America.

In all political, economic and social spheres, the role of social media and non-mediated communication has radically reduced the role of the state, empowering a new, network dynamic that will define the coming decades of the Twenty-First Century. This presentation and paper reviews the current role of social media in ongoing political transformations; compares these uprisings to the disintermediation economic relationships; and attempts to assess the declining role of the state and the rise of the cultural community—a phenomenon which portends dramatic shifts in trade and international regulations.

In an era where budget austerity is the dominant theme for the foreseeable future, the only budget item that the American people can agree upon to cut or to eliminate is foreign aid. Americans consistently overestimate the total amount spent on foreign aid. One commentator wrote “I am convinced that if the US stopped sending money to foreign countries, we could balance the budget in less than 10 years. It is hard to tell, one cannot get the true amount sent to foreign countries.” Yet, the reality is quite different. US foreign aid in 2007 was $41.9 billion of which 39% went to Iraq and Afghanistan, and the bulk of the remainder went to prevent/treat AIDS or to key strategic allies.
Foreign aid, aside from that provided by voluntary charitable societies, is largely as post-World War II construct. Historically, developing nations developed by appropriating for domestic use intellectual property created in more developed nations. This is true of the United States; member states of the European Union; and more recently Japan, Korea, Singapore, Hong Kong; and now most recently, the so-called BRIC countries. As developing nations joined the World Trade Organization, entered into Free Trade Agreements, or TRIPS-plus agreements, they lost their legal ability to exploit foreign intellectual property for domestic use without receiving any corresponding benefit or foreign aid assistance to replace the de facto subsidy to their economies through unlicensed uses. Moreover, even when arguably acting within the scope of their treaty agreements, developing countries are often threatened with political or economic reprisals. Only the largest of developing countries (BRICS) with insular economies can blithely ignore these threats.

This article will recommend that developed countries tacitly tolerate in developing countries so-called piracy or unlicensed uses be viewed as a form of foreign aid or a developmental subsidy, that there are sufficient flexibilities within the TRIPS Agreement and the WTO to permit these uses, that developed countries should not use extraordinary pressure (outside the WTO dispute resolution process) to force developing countries to be TRIPS compliant, and that this acquiesce to uncompensated uses be limited to those uses that do not deny the intellectual property owner of adequate financial or other rewards necessary to encourage further investment in innovative and creative works.

Prof. Leah Chan Grinvald, Saint Louis University School of Law
“ACTA’s Trademark Implications”

Small businesses are at the heart of the American economy, accounting for up to 62 percent of all jobs created in any given year. At the same time, starting a small business is a risky proposition. Approximately fifty percent of all new businesses fail within the first five years. This vulnerability to failure is due to a number of factors, including the disproportionate impact that certain laws may have on small businesses. In particular, intellectual property enforcement laws that favor large stakeholders can have unintended consequences that may impact the viability of some small businesses.

A new source of intellectual property enforcement laws that will have this impact on small businesses is the Anti-Counterfeiting Trade Agreement (“ACTA”). ACTA is a new plurilateral international agreement that requires its member nations to enact new measures with respect to civil, border and digital environment enforcement of intellectual property. This Article focuses on two particular implications that the new provisions of ACTA will have on small businesses: (1) small businesses will be more vulnerable to border seizures (thus impacting their revenue flow) and (2) large trademark holders will be more empowered to interfere with the legitimate business activities of small businesses. These two implications stem from ACTA’s mandates to collapse the distinction between counterfeiting and mere trademark infringement in border enforcement measures, to allow rights holders the ability to stop shipments (including small shipments of a commercial nature) and to disclose information to rights holders without sufficient safeguards for abuse by rights holders.

With ACTA on a “fast track” to effectiveness, it appears inevitable that the agreement will become effective without further negotiations among the countries or further changes to the text of the agreement. However, each member country will need to enact legislation or enhance resources domestically in order to adhere to ACTA. Therefore, this Article provides a number of proposals that could help to mitigate the impact that ACTA will have on legitimate small businesses. For example, this Article suggests that the current United States Customs & Border Patrol focus on counterfeit products that endanger the welfare of Americans be maintained, along with adding procedural safeguards for importers and creating disincentives for large rights holders to abuse the border enforcement system. While these suggestions are
made with goal of mitigating the harms to small businesses, these suggestions will benefit all legitimate businesses, big and small.

Prof. Robert A. Heverly, Albany Law School  
“Breaking the Internet—International Efforts to Play the Middle Against the Ends: A Way Forward”

The Internet was originally designed to provide robust transportation protocols for data transmission packets regardless of their content. While many arguments can be (and have been) made in defense of this approach, it is not the only approach. It was and is a choice, though one that has been largely maintained in the short history of the Internet’s existence.

Since the widespread adoption of networking technologies worldwide, efforts have been made internationally to fundamentally alter the way in which the Internet functions. A number of strategies or issues have recently come to the forefront in this regard including encryption, ISP data retention, “three strikes” rules, and rendering sites “invisible” by altering network functioning. The Net Neutrality debate is relevant here, as well.

Together, these efforts are taking place to some extent in the international arena, and all have significant international implications. In addition, all in one way or another seek to alter piecemeal the design of the Internet itself in pursuit of some other goal (such as protecting intellectual property rights or pursuing national security). They would all take at least one step toward turning the thin, dumb middle of the Internet into a thicker, smarter element that can be used as a counter to the ends that it connects.

These efforts will have unintended consequences in terms of Internet functionality and usefulness. It is not that the design of the Internet should not be changed. Rather, if the Internet’s functioning is to be fundamentally altered, such changes should follow not from a hodgepodge of national and international consideration of individual concerns resulting in a patchwork quilt of separately adopted, interest-based restrictions, but from an international discourse focused on the Internet itself, leading to treaty or convention based obligations on those governments who are its participants. To do this properly, an international—as opposed to national or even regional—approach is required.

A number of existing international organizations have at least some potential for facilitating the kinds of discourse and decision-making necessary to maintain a holistic view of not just specific interests but of the overall structure and functioning of the Internet as a system. Each brings to the table characteristics that would assist in maintaining the efficiency of the Internet as a communications system, but each also suffers from negative characteristics, primarily as to narrowness of focus or to perceptions of special interest capture or control. After considering each of the likely suspects for taking on this important international role, the creation of a new organization is proposed, made up of representatives of many of these existing organizations as well as representatives from non-governmental-organizations dedicated to a future Internet that is robust, efficient, and innovative across a host of measures. Only with such an effort can the promise of the Internet as a communications system be realized.

Prof. H. Brian Holland, Texas Wesleyan University School of Law  
“Social Semiotics, Originality and Authorship in Copyright Law”

Note: Half-baked doesn’t begin to describe it.

This is the second in a series of articles applying social semiotic theory to copyright law. The first article, to be published this month, addresses fair use. This next article examines originality and authorship.
Social semiotic theory provides a new and powerful analytical tool in assessments of originality. Semiotic resources are at the heart of the meaning-making process. Those “semiotic resources have a meaning potential, based on their past uses, and a set of affordances based on their possible uses.” (Van Leeuwen) The sign-maker is motivated to draw upon this potential by transforming existing semiotic resources in an attempt to produce a particular meaning and effect. It is difficult, then, to characterize the text itself as having significant expressive value beyond that of the dominant social conventions constraining the semiotic resources employed. From this perspective, the work is essentially a compilation of semiotic resources—drawn from a conception of the public domain—with strictly limited meaning potential. Social semiotic theory thus challenges those dominant concepts of originality that are grounded in romantic authorship. I will apply this insight to critique various analytical models employed by courts as a means of distinguishing protectable and non-protectable elements of a copyrighted work (e.g., the merger doctrine; the abstraction, filtration, and comparison test).

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

“Territoriality, Sovereignty and Well-Known Marks: Time to Reconsider the Concept of ‘Uni-torriality’?”

Increasing collisions between source signification, market regulation and transborder trade in today’s global digital marketplace would appear to require a reconsideration of the historic limitation of trademarks as a territorially bounded right. At the same time that globalization trends would arguably make territorial boundaries for the recognition of trademarks less relevant, protectionist tendencies in light of the economic downturn of 2008 simultaneously make exceptions to such territoriality less likely. These same trends of protectionism and free trade underscored the early developments of international trademark standards at the turn of the 20th Century as universality fought with territoriality for domestic and international precedence. The old ideas of territoriality and universality should be abandoned in favor of a new approach that recognizes the “uni-torial” nature of modern trademarks. This uni-torial nature acknowledges the territorial nature of certain aspects of trademarks, such as registration prerogatives, while giving appropriate weight to their growing role as universal authenticators for particular goods and services. It combines identified dichotomies in ways that reject dogmatic application of out-dated territorial norms in favor of a new approach that acknowledges the changing nature of trademarks and, provides analytic tools with which to re-examine and reconfigure present trademark regimes to meet the demands of the 21st Century market. Recognizing the reality of uni-torial marks in the 21st Century does not mean that well-known marks are given carte blanche to become the global monopolies. To the contrary, such uni-torial status may well eliminate some of the territorially bounded rights of control over distribution that trademark owners have typically enjoyed. But if the commercial and economic benefits of 21st Century markets are to be fully realized, and modern consumers to be fully protected, old dichotomies must be reconciled and territoriality must give way to uni-torriality.

**Prof. Giuseppe Mazziotti, University of Copenhagen, Faculty of Law (Denmark)**

“Managing Online Music Rights in the EU Digital Single Market: Current Scenarios and Future Prospects”

Developing pan-European markets for online content has become a high priority for the EU Commission within its so-called “2010 Digital Agenda”. Digital piracy is still rampant and the EU Commission seems to have finally realized that the mere enforcement of criminal and civil enforcement proceedings against copyright infringers is largely inadequate for the purpose to foster the creation and growth of legitimate online content services. The key issue now is how to implement online national rights in such a way as to put licensing practices which have partitioned the EU online content sector on a strictly national basis to an end.
My presentation provides a short depiction of the scenarios which materialized in the realm of online music services after the implementation of the EU Commission’s Recommendation 2005/737/EC and the 2008 CISAC (antitrust) decision against EU collecting societies. The presentation shows that these non-legislative initiatives of the EU Commission, instead of providing for economically viable, widely shared and fair solutions, created an undeniable situation of chaos.

As far as things stand, the clearance of online music rights management for single music repertoires (e.g., the repertoires of major international music publishers) is more complex and time-consuming for commercial users than the previous multi-repertoire licensing system on a country-by-country basis. At the same time, such ineffective licensing solution is expected to cause marginalization of small- and medium-size local repertoires and to impact negatively on European cultural diversity. The presentation advocates that legislative measures are necessary in the field of copyright management if the EU wants an effective “Digital Single Market” to develop in the music sector. Considering that unification of national copyright systems is unrealistic for now, the optimal licensing solution seems to be the extension of the “country of origin” principle (and the application of the sole law of that country) which already applies to satellite and cable transmissions and to the supply of audiovisual media services to all pan-European forms of exploitation of online music content.

Prof. Ira Nathenson, St. Thomas University School of Law

“Best Practices and the Law of the Horse: Teaching Cyberlaw Through Role-Playing Simulations”

Judge Frank Easterbrook once mocked Cyberlaw as “the law of the horse,” a subject lacking in cohesion and therefore unworthy of inclusion in the law school curriculum. This Article responds to Easterbrook’s challenge by examining the author’s Cyberlaw class, which incorporates live, online role-playing simulations. The Article concludes that through simulations, Cyberlaw creates tremendous opportunities for the organic teaching of doctrine, lawyering skills, and professional values. Looking to the recent studies Best Practices in Legal Education and the Carnegie Report, as well as to the earlier MacCrate Report, the Article explores the benefits and drawbacks of simulations teaching. The Article concludes that although simulations have significant benefits for law students, they can also provide surprising benefits for scholars by permitting research faculty to deepen the synergies between teaching and scholarship. However, the intensive commitments required for simulations teaching may also exacerbate long-standing systemic tensions in legal education, particularly regarding institutional allocations of faculty resources as well as the conflicting roles of individual research faculty as teacher-scholars.

Prof. Alina Ng, Mississippi College School of Law

“Authentic Authorship”

My project explores the American copyright system from a fresh perspective by looking at it as a system of norms that centers on the author as the creator of a work with the author’s natural rights forming the copyright system’s core essence. Despite the general consensus that the basic concepts and technical details of American copyright law have their genesis in England’s Statute of Anne that first protected the author’s copyright in literary and artistic works, the similarities between the first copyright statute in England and early American copyright law are negligible considering the disparate circumstances which led to the births of both legal systems. This project aims to demonstrate that the foundational premise of the American copyright system was the encouragement of authorship to facilitate the development of a new world rather than break-up established monopolies over the book trade as was the intent of the Statute of Anne. By examining the social norms that surrounded the early development of American copyright laws, this paper demonstrates that the production and use of creative works were guided by certain moral and ethical principles, which honored an author’s creative or expressive identity as embodied in the work. This finding has important implications for American copyright jurisprudence because it shows that an increasing focus on the protection of economic interests of publishers instead of
the expectations authors and their readers (as proxy for society as a whole) neglects a significant constituent that should be the focus of a legal and social institution that has progress of science as its institutional goal. For the copyright system to achieve cultural and social progress on a sustainable basis, the notion of authentic authorship and the author as the creator of a work must be placed at the core of the copyright system to ensure that works produced by authors make a positive contribution towards social and cultural growth.

Prof. Liam O’Melinn, Ohio Northern University Pettit College of Law
Stealing from the Public: Private Domains and Public Burdens

This paper continues a project on which I have been working, the first part of which is entitled “The Recording Industry v. James Madison, aka ‘Publius’: The Inversion of Culture and Copyright.” That article argues in part that the vision that gave rise to copyright for sound recordings relies on a philosophy that inverts culture and copyright. My current paper will focus on some of the modern consequences of this inversion, first with respect to uncertainties attending the theory of the public domain, and second with respect to the strange combination of private benefits and public burdens that the copyright regime is endorsing.

The paper proceeds in two parts. The first deals with the uncertain status of the public domain, an issue recently placed in the spotlight by the Supreme Court’s recent decision to hear Golan v. Holder, a 10th Circuit decision affirming the constitutionality of granting copyright to foreign works already in the public domain. There is nothing novel in the contention that the public domain is rather uncertain in its scope. This paper attempts to explain this uncertainty as a consequence of what I call “the mythology of common-law copyright.” This mythology is based on an inversion of the relationship between culture and copyright, which in this setting places the copyrighted and ostensibly private domain first, with the public domain appearing as a defensive and rather unsatisfactory afterthought. If the public domain seems to take a distant second place to the private domain of copyright, that is at least in part because of the influence of a theory that places copyright ahead of communication.

Second, the paper looks at one of the most important practical effects of this inversion: The transformation of the copyright regime into a system of private rights and public burdens, beginning with statutory damages and continuing to the public enforcement of intellectual property rights. As is widely known, several prominent filesharing cases filed by the recording industry have resulted in very large awards of statutory damages. The eventual direction of the law on this issue is not clear, and some judges have reduced statutory damages awards in filesharing cases. On the other hand, even these judges have sustained rather large awards (in Tenenbaum the jury award of $675,000 for 30 downloads was reduced by Judge Gertner to $67,500—still $2,250 per song), and in Capitol v. Thomas-Rasset the USDOJ filed a brief in support of the constitutionality of the damages award, a brief which hints at the increasing involvement of government in the enforcement of intellectual property rights. More interestingly, the government also appears to be getting increasingly involved in the direct enforcement of intellectual property rights in the criminal arena. The effort appears to be systematic, involving cooperation between the rights-holders and prosecutors, and the paper concludes with an assessment of the nature and extent of these efforts.

Nahoko Ono, Graduate School of Law, Hitotsubashi University (Japan)
“Crossroads of Patents and Copyrights—From Secured Transaction Perspective”

Although people recognize the importance of IPs in the economy, IP finance or IP secured transaction cannot be flourished by now. Japan is worse with fewer success stories. Why? Many raise the difficulty in assessing the value of IPs. But isn’t there any legislative issue to consider? That is what I would like to answer. Focusing on the Patent Act (§ 261) and Copyright Act (§§ 201–205) in the US, as well as the
related provisions in Japanese Patent Act and Copyright Act, I would like to conclude with a policy implication on: whether there is any legislative issue to be resolved in both countries; and if yes, how.

Prof. Janewa Osei Tutu, University of Pittsburgh School of Law
“Value Divergence in Global Intellectual Property Law”

It is a challenge for the United States to adequately protect the interests of its intellectual property industries. It is particularly difficult to effectively achieve this objective when the interests of the United States are not in line with the social, cultural and economic goals of other nations. Yet, as a major exporter of intellectual property protected goods, the United States has an interest in negotiating effective international intellectual property agreements that are perceived to be legitimate by the state signatories and their constituents. Focusing on value divergence, this paper contributes to the growing body of literature on developing a robust but flexible global intellectual property system. The paper argues that the trade-based approach to global intellectual property law undermines the apparent gains made in international intellectual property protection because it promotes a utilitarian economic view of intellectual property law while minimizing other values. Trade-based intellectual property also reduces the need for intellectual property interests to align, and therefore fails to achieve mutually beneficial agreement on substantive intellectual property law and policy.

Prof. Lucas Osborn, Campbell University School of Law
“Instrumentalism at the Federal Circuit”

In the last eight years, the Supreme Court has taken an increased interest in patent law, and in each case it has decided, it has reversed the Federal Circuit’s patent-related decision. In addition, the Supreme Court has at times been vocally critical of the Federal Circuit’s failure to follow Supreme Court precedent. How has the Federal Circuit responded to this intervention? This Article asserts that the Supreme Court’s increased attention has changed the Federal Circuit’s rhetoric, but not its actions. While the Federal Circuit has responded by discussing Supreme Court precedent in its recent patent decisions, a critical analysis reveals that the Federal Circuit is hyper-interpreting that precedent to appear to require the Federal Circuit’s policy-driven outcome, when in reality the precedent is not so confining. The policy motivating the Federal Circuit to hyper-interpret Supreme Court precedent is its desire for relatively outcome-determinative rules. Rather than discuss its desire for certainty and the effects of its decisions, the court has minimized policy discussion. This Article further observes that the Federal Circuit’s hyper-construction of precedent and its failure to discuss policy will reduce certainty and lead to sub-optimal legal rules.

Prof. Eric A. Priest, University of Oregon School of Law
“Copyright, Scholarship, and the ‘Harvard’ Open-Access Policy”

For many, making works of scholarship universally accessible and free of journal subscription fees aligns with the noblest goals of higher education. The internet provides the technology platform to globally distribute open access scholarship, and some studies indicate that articles made freely available on the internet enjoy substantial boosts in readership and citations. Open access scholarship might appear to be a win-win for faculty authors (and by extension their universities), readers, and university libraries increasingly under budget pressures from skyrocketing commercial journal prices, but the movement faces dire challenges.

In most fields, commercial publishers own the most esteemed journals. Scholars, concerned with tenure, promotion, and prestige, seek to publish in top journals, and are usually willing to do so according to a journal’s terms. Open access scholarship threatens commercial publishing business models, and many journals refuse to accept previously published works (including works freely distributed on the internet).
or deny or restrict an author’s right to post a “post-publication” version the article online. Some scholars argue that universities and research funding institutions have the leverage and incentives that individual authors lack to extract from publishers terms that best facilitate open access to scholarship.

Short of claiming outright ownership of faculty copyrights under the work for hire doctrine, as some scholars recommend, what is the university’s role in promoting open access and how proactive can universities be in the dissemination of faculty scholarship before encountering significant copyright-related risks? Some universities, including Harvard, have enacted official policies that purport to “require” faculty to make scholarly publications available for open access by granting the university, solely by virtue of the policy’s existence, a nonexclusive, noncommercial right to copy and distribute each faculty member’s work, subject to the faculty member’s right to opt out of the policy for a particular work upon request. Harvard’s policy has become a template for other institutions seeking to promote open access scholarship, but is fraught with copyright and policy questions. What if publishers, already hostile to the open access movement and facing declining revenue, become litigious and challenge the open distribution of works that appear in their pages but were ostensibly licensed for open distribution under this model? Do universities actually hold the rights they purport to, and what if they don’t?

On one hand, a mandatory open-access policy promotes and facilitates the development of open access scholarship by eliminating the tedious and politically perilous exercise of seeking express—and ideally written and signed—licenses from all faculty. Adoption of such policies does increase the number of articles faculty submit to open-access repositories and increases awareness of open access among faculty and the general public. But the model doesn’t square well with a number of Copyright Act provisions, including the Act’s preference for written and signed licenses (for example, Section 205(e), which grants a nonexclusive license evidenced by a signed writing priority over a subsequent transfer of copyright ownership), its termination of transfer rules, and its work made for hire rules.

Examining the relevant rules-in-use suggests that the state of copyright ownership in faculty scholarship is an indeterminate mess. I argue this is attributable at least in part to the Act’s “one size fits all” economic conception of copyright; the Act’s awkward fit with nonmarket production models creates uncertainty about ownership and permissions relating to works created under such models, including scholarship. This uncertainty creates palpable risk for universities that post faculty scholarship in institutional open-access repositories, and that threatens to chill efforts to involve universities in the open access movement. On the other hand, uncertainty and ill-fitting top-down rules engender experimentation by institutions (the “Harvard” open-access policy and Creative Commons are examples). These “locally developed” rules are aimed not at the allocation of economic rights (something dealt with squarely in the statute) but rather the governance of a commonly-held resource—information. I argue this kind of experimentation benefits copyright law when it aims to fill gaps not conceived of by Congress and is consistent with the utilitarian goal of information dissemination, and discuss the implications for courts as well as for copyright reform efforts.

Prof. Joshua Sarnoff, DePaul University College of Law
“The Patent System and Climate Change”

The amount of greenhouse gas emissions and consequent climate changes and social responses will depend substantially upon the rapid development and widespread dissemination of a wide variety of new mitigation and adaptation technologies. The international approach adopted by the UN Framework Convention on Climate Change in Cancun will focus the worldwide innovation system more closely on private funding and markets, and thus on the acquisition of patents at the front end of the coming innovation pipeline. The choice to rely on private markets and patents is highly debatable. But it is certain to create substantial tensions for the patent system to assure low-cost access to patented technologies at the back end of technology transfer needs.
This article first describes the uncertain case for relying on the patent system, the tensions that will result from the unbalanced worldwide patenting of climate change technologies, the magnitude of the coming innovation needs, and the measures that have been proposed to limit the effect of the patent system on development of and access to climate change technologies. The article then describes six proposals for maximizing the innovation potential of the patent system while minimizing the costs of access in both the developed North and the developing South. The first set of proposals focuses on protecting research, directing patent incentives towards where they are most needed, and assuring inter-operability of innovations with patented technologies. The second set of proposals focuses on retaining and using ownership powers (and making better use of regulatory powers that look very similar) to better assure widespread access and low-cost licensing of patented technologies. The final proposal addresses expanding access to patented technologies that are voluntarily supplied at low cost to certain markets. These measures are more likely to be employed, to be more effective, and to be perceived as fairer and as less harmful to ex-ante innovation incentives than the alternative, ex-post regulatory actions that will remain available.

**Jenny Lynn Sheridan, Columbia University School of Law**

“Rise of Property Rights Theory Swallows up Traditional Copyright Privileges of First Sale and Fair use”

Traditionally, copyright law has facilitated secondary markets for the supply of information including books, discs and tapes through the recognition of the “first sale” doctrine which permits resale of a copyrighted work to occur freely, without the authorization of the copyright owner. Likewise copyright law sanctions certain activity through the “fair use” doctrine which permits copying and distribution of copyrighted works without the permission of the copyright owners for limited circumstances related to cultural expression such as parody and criticism or edification of society through education, journalism and scholarship.

I argue that these traditional doctrines of fair use and first sale are consistent with and essential to the “traditional incentives” theory for the justification of copyright. The “traditional incentives” model discerns limits on the ability of the copyright owner to control the reproduction and distribution of its creative works, and views the first sale and fair use doctrines as important tools to achieve the balance necessary to serve the public interest. I argue that traditional jurisprudence on the fair use and first sale doctrines have adhered to the “traditional incentives” model. The rise of “property rights” theory in copyright threatens to swallow up these traditional checks on copyright. Paul Goldstein’s work cleverly develops the “property rights” paradigm as the view held by the “copyright optimists.” In his treatise published in 1994, Professor Goldstein argued on behalf of the copyright optimists stating that “the logic of property rights dictates their extension into every corner which people derive enjoyment and value from literary and artistic works.” The result is a narrow construction of the fair use and first sale doctrines, arguably no exceptions at all.

Content owners, fearing the unregulated Internet as a fatal threat to their business interests, lobbied and Congress passed the Digital Millennium Copyright Act (“DMCA”) in 1998. The digital encryption protection enshrined in the DMCA represents a paradigm shift in copyright law. It reverses the logic of the regulatory scheme of copyright. In the new regime of digital enforcement, the copyright holder essentially writes the rules of copyright into the technology, preventing any reproduction or distribution of the creative work not sanctioned and authorized by the copyright holder. This article explores what society loses and gains in the bargain and its effect on the non-consensual uses of fair use, including cultural expression, education and innovation. The “maximal control” view of the “property rights” paradigm represents a tectonic shift in the underlying justification for intellectual property that I argue is inconsistent with Constitutional justification and Supreme Court jurisprudence.
I plan to explore and propose interventions to the DMCA regime that ameliorate these negative effects. First sale and fair use doctrines, born of common law construction, were created as flexible standards rather than rigid rules. The current DMCA framework does not allow for the balancing of interests and evaluation of social value of the non-consensual uses that judicial lawmaking traditionally supported. Possible judicial responses to update the first sale and fair use doctrines to accommodate the realities of the digital age will be proposed.

Dr. Nic Suzor, Lecturer, Law School, Queensland University of Technology (Australia)
“Examining Scarcity: Incentives, Access, and the Quality of Progress”

Copyright reform is in the air. There is growing recognition that the system is dangerously out of touch with social norms, almost to the point where it will lose its claim to legitimacy. As industry groups continue to attempt to shift these norms to more closely align with their business models, copyright scholars on the other side are approaching consensus that the law must be simpler and fairer if it is to achieve acceptance. Copyright theory, as articulated by both these sides, continues to revolve around the necessity of providing incentives for the production of expression. The twin goals of copyright—to promote the production and the dissemination of expression, are set in opposition; the incentives argument justifies—to varying extents—the imposition of static inefficiencies in distribution of expression in order to generate dynamic efficiencies in its production.

This paper examines the role of scarcity in copyright law beyond the traditional conception of incentives versus access rights. Under a copyright theory that relies on a dichotomy between incentives and access, the best we can aim for is to develop a smoothly operating market of expression that is leaky enough to mitigate the most harmful effects of scarcity but strong enough to encourage producers to invest in copyright products. The theory in which this debate is framed assumes scarcity is fundamentally required to support market transactions, reflecting a particular conception of progress that depends upon the market to provide a neutral arbiter of value in order to ensure that the right work is being created and that creators are rewarded in proportion with the quality of their creations. This paper challenges the implicit assumptions in this conception of progress in order to examine more closely the justifications for artificial scarcity in the digital context. I seek to disentangle some of the interests that typically support excludability in an effort to imagine a copyright law that nurtures creativity and supports commercial cultural production without necessarily positioning access as diametrically opposed.

Prof. Joseph A. Tomain, University of Louisville School of Law
“Uncertainty: Fair Use and The Grateful Dead”

Uncertainty in fair use analysis is probably less a hot topic than an endlessly debated one. Some argue that a fair use defense is nothing more than a lottery ticket and reason to hire a lawyer. Others offer empirical research to demonstrate that fair use litigation is not hopelessly unpredictable. Still others believe that the future of fair use itself is uncertain because of technological protection measures and international harmonization of copyright law. Fair use, however, is far from the only legal doctrine or area of law that is subject to discourse of uncertainty in legal analysis.

Determining whether a work satisfies the originality requirement for copyright protection has been described as being an uncertain analysis. Resolving some real property disputes, such as nuisance complaints, involves uncertain legal conclusions. The preface of a popular Contracts casebook advises first-year law students that, “Living with ambivalence and uncertainty is not always pleasant, but the ability to do so is . . . [a] necessary lawyering skill.” Thus, uncertainty is not only a fact of life; it is a fact of law. But, what of it?
Through the context of the Grateful Dead and its enigmatic community, this paper-in-progress seeks to contribute to the discourse of uncertainty in law in two ways. First, some degree of uncertainty in fair use analysis is socially beneficial because it allows space for creative works to flourish and does not destroy the ability of creators to financially benefit from their works. Second, it builds on scholarship that views the cycle of muddy rules to crystals rules back to muddy rules as a cycle in the pursuit of justice.

Prof. Jane Yakowitz, Brooklyn Law School
“Privacy Chaff”

The right to privacy suffers from an identity crisis. Many putative harms put forward by policymakers and legal academics are abstract, based on little if any empirical evidence, and not weighed against countervailing benefits from access to information. Regulators stand poised to promulgate new policies to address privacy risks from the Internet. However, important privacy interests are overlooked in this effort because they are yoked together with speculative, poorly-reasoned theories of harm.

This Article has two goals. First, it sets out a new way to assess information harms that avoids resorting to the complex mishmash of concepts that currently clutter the privacy discourse. This new methodology demonstrates that most properly cognizable privacy harms occur at two distinct points: observation, such as intrusion harms, and use, such as decisional harms. Second, the paper employs the framework to identify weak privacy arguments—these are the privacy chaff that is best separated and discarded, so as to focus on actual privacy threats. The Article argues that the chaff includes automatic prohibitions on data re-purposing, and certain types of dignity arguments that ultimately reduce to an alleged right to delude ourselves. The Article concludes by suggesting ways in which its framework, and the more rigorous analysis of privacy harms it enables, can re-shape legal discourses about privacy to society’s benefit.