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
“Safe Harbor for the Innocent Infringer in the Digital Age”

Prof. Kristelia A. Garcia, George Washington University School of Law
“Extra-Legal Rights Accretion”

Kylie Pappalardo, Ph.D. Candidate, Faculty of Law, Australian Catholic University (Australia)
“The Intersection Between Intermediary Liability in Copyright and Principles of Tort Law”

Prof. Seagull Haiyan Song, Loyola Law School—Los Angeles
“Protection of Audio-visual Works in China: A Hybrid Model”

11:15  Coffee Break

11:30  Panel 2: Patent Law I

Presenters: Prof. Sapna Kumar, University of Houston Law Center
“Life, Liberty, and the Pursuit of Genetic Information”

Prof. Chidi Oguamanam, Faculty of Law, University of Ottawa (Canada)
“Intellectual Property, and ‘Intellectual Assets’: Forging Socially Beneficial R&D in Plant Genetic Resources for Food and Agriculture”
Prof. Greg R. Vetter, University of Houston Law Center  
“Are Prior User Rights Good for Software?”

Prof. Steven R. Wilf, University of Connecticut School of Law  
“Patent and Social Movements in Late 19th Century America”

1:15 Lunch

2:15 Panel 3: Intellectual Property Law

Presenters: Prof. Deidré A. Keller, Claude W. Pettit College of Law, Ohio Northern University  

Prof. Lucas Osborn, Campbell University School of Law  

Prof. Harry Surden, University of Colorado Law School  
“Technological Costs as Law in Intellectual Property”

3:45 Coffee Break

4:00 Panel 4: Trademark Law

Presenters: Dr. Henry Biggs, Washington University School of Law  
“State Storm Rising? On the Fall and Potential New Rise of State Trademark Rights” (with Prof. Charles McManis)

Prof. Shontavia Johnson, Drake University Law School  
“Memetic Theory, Trademark Law and the Viral Meme Mark”

Dr. P. Sean Morris, Research Fellow, Faculty of Law, University of Helsinki; Visiting Scholar, Fordham University School of Law (Finland)  
“Trademarks as Sources of Market Power”

Prof. Martin R.F. Senftleben, VU University Amsterdam (The Netherlands)  
“Trademark Law and the Public Domain”

Prof. David Welkowitz, Whittier Law School  
“The Virtues and Vices of Clarity in Trademark Law”

6:00 Roundtable Adjourns for the Day

6:30 Dinner for Roundtable Participants

Salisbury House  
4025 Tonawanda Drive
9:15 Breakfast

9:45 Panel 5: Enforcement and International Issues

Presenters: Prof. Annemarie Bridy, University of Idaho College of Law
“Of Counterfeitters and Kingpins: Civil Forfeitures in the War on Piracy and the War on Drugs”

Prof. Patricia Judd, Washburn University School of Law
“The TRIPS Balloon Effect”

Dr. Nahoko Ono, Visiting Scholar, Columbia University School of Law (Japan)
“Japan’s Approach to FTA-IP”

11:15 Coffee Break

11:30 Panel 6: Copyright Law II

Presenters: Prof. Jon M. Garon, Chase College of Law, Northern Kentucky University
“Digital Hollywood 2.0: Reimagining Film, Music, Television and Publishing Distribution as a Global Artist Collaborative”

Prof. Paul J. Heald, University of Illinois College of Law
“Two New Empirical Projects: How Copyright Makes Works Disappear and the Tolerance of Infringement on Youtube”

Prof. Liam O’Melinn, Claude W. Pettit College of Law, Ohio Northern University
“The Ghost of Millar v. Taylor”

Prof. Zvi Rosen, Adjunct Professor, New York Law School
“Survey of Copyright Law for Pre-1972 Sound Recordings”

Dr. Nicolas Suzor, Senior Lecturer, Faculty of Law, Queensland University of Technology (Australia)
“Crowdfunding for the Commons”

1:30 Lunch
**2:30**  
**Panel 7: Patents Law II**

**Presenters:**  
Prof. Sarah Burstein, University of Oklahoma College of Law  
“Costly Designs”

Prof. William Hubbard, University of Baltimore School of Law  
“The Competitive Advantage of Weak Patents”

Prof. W. Keith Robinson, Dedman School of Law, Southern Methodist University  
“The Aftermath of Akamai”

Prof. Karen E. Sandrik, Willamette University College of Law  
“Formality in Patent Licensing”

Prof. Joshua Sarnoff, DePaul University College of Law  
“Rethinking Application Drafting and Examination”

**5:00**  
**Roundtable Adjourns for the Day**

**7:00**  
**Dinner for Roundtable Participants**

The Des Moines Club  
666 Grand Avenue
COMMENTATORS

• Prof. Howard B. Abrams, University of Detroit Mercy College of Law
• Prof. M. Scott Boone, John Marshall Law School, Atlanta
• Prof. John T. Cross, University of Louisville School of Law
• Prof. Joseph R. Donnini, Whittier Law School
• Prof. Jessica M. Kiser, Gonzaga University School of Law
• Prof. Tian Xiaoling, Law School, Chongqing Jiaotong University (China)
• Prof. Peter K. Yu, Drake University Law School
ABSTRACTS

Dr. Henry Biggs, Washington University School of Law
“State Storm Rising? On the Fall and Potential New Rise of State Trademark Rights” (with Prof. Charles McManis)

This article addresses the historical interplay of federal, state and common law trademark rights as they relate to the scope of geographic protection. The article looks closely at the narrow context where federal trademark law may arguably provide for state trademark law to prevail. The article notes, however, that the specific state trademark language necessary for that state trademark right to prevail has slowly vanished from most state trademark statutes. Yet while the door has seemed to be closing in this area, a relatively recent case, National Ass’n for Healthcare Communications, Inc. v. Central Arkansas Area Agency on Aging, Inc., suggests that state trademark statutes which provide that their laws should be interpreted “consistent with” the Lanham Act, also may indicate a possible context where state trademark law might prevail. This interpretation of “consistent with” opens up potentially a whole new avenue for state trademark law to assert itself against federal trademark law.

Prof. Annemarie Bridy, University of Idaho College of Law
“Of Counterfeiters and Kingpins: Civil Forfeitures in the War on Piracy and the War on Drugs”

“Operation in Our Sites” is a multiagency federal law enforcement initiative designed to curb online intellectual property infringement through the government seizure and forfeiture of Internet domain names. Since the program launched in 2010, agents working under its auspices have seized over 800 web sites, over 200 of which have been forfeited to the government. Owners of sites targeted for seizure by Operation In Our Sites are alleged by the government to traffic in counterfeit patented medicines and branded luxury goods as well as unauthorized streams and downloads of copyrighted works, including music, movies, live sporting events, and computer software.

While the seizure of Internet domain names is a relatively new weapon in the War on Piracy, asset seizure and forfeiture came of age as law enforcement techniques during the War on Drugs in the 1970s and 80s. The specific goal of this project is to examine Operation in our Sites as a problematic application in Cyberspace of legal procedures developed to reach physical assets and tangible instrumentalities of crime. A broader goal of the project is to gather insights from a comparative analysis of the “War on Drugs” and the “War on Piracy” as organizing metaphors for expensive and seemingly endless government efforts to eradicate international networks for the distribution of illegal goods.

Prof. Sarah Burstein, University of Oklahoma College of Law
“Costly Designs”

Design patent examination has been repeatedly criticized for, among other things, being “too expensive.” Indeed, many commentators have argued that the problem is not the amount of money that it takes to get a design patent but the mere fact that any money must be spent at all. These commentators argue that design rights should arise costlessly, like copyrights. This Article utilizes recent insights in costly screen theory, including the model developed by Jonathan Masur and David Fagundes, to evaluate whether the costliness of design protection is really as problematic as the current literature suggests. It argues that designs tend to array more like utility patents than copyrights across dimensions of private and social value. This suggests that the costliness of design patents may actually have a net positive effect on social welfare. This Article will then consider the implications of these conclusions on the larger examination-v.-registration debate and on the United States’ current implementation of the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs. It will also consider whether
different types of designs array differently in terms of private and social value and, if so, whether that might justify using different types of protection for different types of designs.

**Prof. Tonya M. Evans, Widener University School of Law—Harrisburg**

“Safe Harbor for the Innocent Infringer in the Digital Age”

Today’s copyright consumers enjoy round-the-clock Internet connectivity and interactivity via multiple devices and in various mediums. That connectivity and interactivity is delivered and maintained by online service providers (OSPs), which provide a range of online services including conduit and storage services. Concerned with potential liability for any infringing uses by their customers, the OSP industry lobbied Congress successfully to exempt certain OSPs from such liability through the Digital Millennium Copyright Act’s “safe harbor” provisions. If (or more accurately when) those customers copy, perform, display, republish or adapt works in ways violative of copyright, the OSPs are shielded from liability altogether. Again, today’s unwitting direct infringer is not so fortunate.

Academic commentators and user-advocate groups have decried the varied and various shortcomings of copyright law as applied in the digital age. Even judges have implored Congress in their opinions to clarify and remedy the law, as in the case of the excessive statutory damages dilemma. However, I am aware of no one who argues as I do in this Article, that certain direct innocent infringers should be afforded “safe harbor” protections in the online context where digital goods are involved similar to those afforded OSPs in the DMCA. This proposed statutory amendment seems even more relevant now that a coalition of Internet Service Providers (ISPs) began implementing the much-anticipated industry-response to Internet piracy known as the ‘six strikes’ rule and Copyright Alert System.

Accordingly, the primary goal of this Article is two-fold: to explore the role of the innocent infringer defense historically and in the digital age and to offer a legislative fix in the form of safe harbor provisions for direct innocent infringers akin to the DMCA’s OSP protections. Such a provision would seem more efficient and ‘just’ in the online environment where unwitting infringement for the average copyright consumer is far easier than ever to commit, extremely difficult to police and often causes little, if any, cognizable market harm. Without specific harm little exists in the case of innocent infringement to compensate. And by its very nature, innocent infringement could never be deterred by stiffer penalties because innocents act without knowledge their actions may be infringing. Therefore, safe harbor for certain uses of copyrighted works online seems not only desirable but necessary in order to reflect established informal behavioral norms consistent with, and supportive of, a robust and dynamic Internet system.

In Part I, I discuss the innocent infringer dilemma in greater detail. I trace the historical roots of the innocent infringer defense, including its traditional interdependence with copyright formalities. Further, I highlight the policy considerations reflecting the importance of a viable innocent infringer defense as part of ‘just’ statutory damage awards in infringement actions. I compare the 21st century user of copyrighted material to the traditional user model, with a particular focus on the user-expectations and online norms of the digital native.

In Part II, I examine Title II of the DMCA, which created limitations on the liability of conduit and storage OSPs for copyright infringement if certain criteria are met. Ultimately, this Part serves to highlight the shared concerns between OSPs and good faith users of their services who should benefit from similar protections.

In Part III, I propose an amendment to the DMCA and statutory damages framework that includes a user safe harbor provision to support an innocent infringer minimum statutory damage award. The proposed language offers to Congress a specific framework that would grant safe harbor protections to a certain
class of good faith online users of digital goods similar to those currently enjoyed by OSPs. User safe harbor seems optimal in the digital environment especially when users access digital goods that neither bear copyright notice nor provide some other notice at the point of access. Such provisions are also optimal when CMI is encrypted and, therefore, inaccessible to users and the user, upon receiving notice, takes immediate action to remedy the infringing activity.

Finally, in Part IV I explore other ways the existing law can be modified—both the statute and its application—to provide optimal or at least improved legislative, judicial and perhaps administrative solutions to the innocent infringer liability quandary. Any truly effective change must provide clearly articulated, consistent, reasonable and just laws and appropriate guidelines to the judiciary about how to apply those laws to all copyright consumers in the digital age.

Prof. Kristelia A. Garcia, George Washington University School of Law
“Extra-Legal Rights Accretion”

The legal rights afforded copyright licensors and licensees are frequently supplemented by privately created rights. Some of these rights—such as those established by private agreement, wherein a contractual obligation to pay may be established where no such legal obligation exists—can inure to the benefit of copyright holders. Others—such as a private action that falls into a legal gray area—can de facto inure to the benefit of the licensee. This phenomenon, which I term “extra-legal rights accretion,” may be prompted by a gap, hole or inefficiency in the law, be it legislative or judge-made. These privately created rights pose two primary concerns: The first is norms based, and stems from the danger of setting bad precedent that becomes engrained in cultural and industrial norms prior to a legal ruling from the legislature or the courts. The second is the potential for detrimental peer pressure of smaller players in the space. This Article will consider these normative implications and suggest policy changes to minimize their effect.

Prof. Jon M. Garon, Chase College of Law, Northern Kentucky University
“Digital Hollywood2.0: Reimagining Film, Music, Television and Publishing Distribution as a Global Artist Collaborative”

This presentation will analyze the legal strategies and business models utilized by the new film distribution companies and contrast these with the models working for Bollywood, online music distribution at Apple, and e-book strategies at Amazon and Google. These strategies include social networking and community development at the inception, production and distribution stages of the content. Distribution 2.0 begins with crowd-funding and related strategies to engage the audience before and during production to build interest prior to distribution. It analyzes current financial structures to assure a healthier economic relationship between participants, producers, and distributors in order to create a sustainable business model. It then looks at the distribution strategies to emphasize the ability to use social networking and communities of interest to build and sustain audiences and rethink pricing strategy. This talk will address the financial regulations, intellectual property laws and contracting strategies that interfere with existing models and articulate the potential best practices for the next generation of narrative and documentary films. The model also creates a platform for shorts, episodic content (e.g., series television) and music.

Prof. Paul J. Heald, University of Illinois College of Law
“Two New Empirical Projects: How Copyright Makes Works Disappear and the Tolerance of Infringement on Youtube”

Two ongoing projects explore who makes works available to the public. First, I crawl randomly through the Amazon warehouse charting the initial publication dates of a random selection of books and songs.
Second, I follow the life of number music hits in Brazil, France, and the U.S. from 1930 to the present on Youtube, tracking the nature of their appearances and rates of monetization, among other factors. The data is preliminary but very interesting.

Prof. William Hubbard, University of Baltimore School of Law
“The Competitive Advantage of Weak Patents”

Does U.S. patent law increase the competitiveness of U.S. firms in global markets? This Article argues that, contrary to the beliefs of many U.S. lawmakers, U.S. patent law currently undermines the ability of U.S. firms to compete in global markets because strong U.S. patent rights actually weaken an overlooked but critical determinant of U.S. competitiveness: rivalry among U.S. firms. Intense domestic rivalry drives firms relentlessly to improve, spawns related and supporting domestic industries, and encourages the domestic development of advanced factors of production, like specialized labor forces. U.S. patents restrict rivalry among foreign firms less because U.S. patents have little extraterritorial effect. Moreover, due to legal and economic differences between the United States and other countries, foreign patents do not equilibrate competitive conditions abroad. Consequently, for U.S. firms to benefit from the same competitive environment as foreign firms, U.S. patents should be weakened. Such changes, however, also threaten to reduce U.S. competitiveness because U.S. patents promote the development of new inventions that help U.S. firms compete in global markets. This Article thus exposes a deep tension in U.S. economic policy. Unfortunately, lawmakers have failed to recognize this tradeoff and, as a result, have adopted excessively strong patent protections that undermine U.S. competitiveness. This Article addresses this problem by proposing balanced reforms that will selectively weaken U.S. patent protection to increase U.S. competitive advantage.

Prof. Shontavia Johnson, Drake University Law School
“Memetic Theory, Trademark Law and the Viral Meme Mark”

This Article proposes that memetic theory is a useful lens through which to view trademarks, particularly as there has been a rise in the number of applications for culture-driven words and catchphrases in the United States Patent and Trademark Office. Memetic theory, or memetics, is an emerging field of scientific study related to how units of information evolve and replicate. These units of information, called memes, undergo a process of natural selection similar to that of genes. To view trademarks as memes, they must not only exist in the proper form, but they must also subsist in an environment where replication, variation, and selection exist in appropriate measure. Under current trademark jurisprudence, over-protection and over-enforcement of trademarks pose a threat to the natural selection environment. The recent phenomenon of trademark applications for culture-driven words and catchphrases are but one manifestation of the interaction between memetic theory and trademark law. Applying memetics to trademark law calls for a reassessment of current legal standards, and this Article concludes by offering further insight into where to explore the intersection between this new science and trademark law.

Prof. Patricia Judd, Washburn University School of Law
“The TRIPS Balloon Effect”

This Article argues that much of the discomfort surrounding the current marriage of intellectual property rights (IPR) protection and global trade stems from the impossibility of ascertaining a static definition of either trade or intellectual property. In fact, the evolutionary nature of both fields renders fruitless any attempt at genuine stability where those fields intersect. Yet, the phrase “trade-related aspects of intellectual property rights” delineates the mandate of the World Trade Organization’s IPR agreement, TRIPS. Most critics of the TRIPS mandate’s breadth have focused on the historical meaning of the pertinent phrase at the time of negotiation. However, an historical focus ignores the most important part of the equation. The question is not what “trade-related aspects of IPR” meant then. The question, rather,
is what the phrase means now, reflecting the evolution of that meaning through time. This Article posits that the two are not the same. Rather, marketplace externalities affecting both international trade and intellectual property transactions have expanded the original TRIPS mandate, creating a balloon effect. Parties’ lack of identification of the balloon effect has contributed in large measure to pervasive perceptions that TRIPS is overreaching and underperforming, and has driven much of the discontent behind the recent spate of regime-shifting away from the WTO. The Article posits that this forum-shifting is premature because it reflects a lack of critical analysis and understanding of the underlying causes of TRIPS discontent. The Article illustrates that TRIPS actually is better-equipped to deal with the balloon effect than its critics realize, because it contains specific textual mechanisms—currently under-utilized by parties—that can provide balance in a trade-dominant world. The Article calls for a re-examination of the TRIPS mandate in the context of the balloon effect, greater utilization of that Agreement’s assets in combating the perceptions of overreaching and underperformance, and caution in forum-shifting through negotiation of new agreements likely to prove less effective and less malleable.

**Prof. Deidré A. Keller, Claude W. Pettit College of Law, Ohio Northern University**


Many advocates of intellectual property protection argue that IP is property and, therefore, like property, has as its defining quality, the right to exclude. This paper will begin with a recognition that the right to exclude has never been absolute. Rather, limiting concepts have been a part of our common law property system since its inception. In this piece, I will sketch the contours of the qualified right to exclude beginning with the ways in which courts protect this right including (1) the award of more than actual damages; (2) the granting of injunctive relief; and (3) the exercise of the police power of the state to punish trespass as a crime. All have corollaries in the intellectual property context. The piece will then move on to consider various limitations on the right to exclude including: (1) the public trust doctrine; (2) adverse possession; and (3) abandonment. Finally, this paper will consider the possibility of introducing these limitations (or corollaries thereto) into IP discourse.

This piece will be grounded in the scholarship considering the relationship between property and personhood. Margaret Jane Radin’s work will provide the theoretical basis for how we can make reasoned decisions when faced with competing claims. The piece will also engage the concept that property (and, therefore, intellectual property) includes not only rights but also duties. Eric Freyfogle’s recent work, On Private Property: Finding Common Ground on the Ownership of Land (Beacon 2009) pursues this course in the real property context. I plan to extend this theoretical endeavor to the intellectual property context.

**Prof. Sapna Kumar, University of Houston Law Center**

“Life, Liberty, and the Pursuit of Genetic Information”

Over the past few decades, scientists have made breakthroughs in understanding how genetic mutations contribute to disease in the human body. This has led to the availability of genetic testing, allowing patients to know whether they carry a particular mutation and allowing doctors to provide appropriate medical treatment based on test results. Thus, knowledge of one’s genetic information can help people make informed decisions regarding medical treatment.

A complicating factor, however, is gene patents. An inventor that determines the function of a gene and isolates it can get a patent, not just on the isolated gene itself, but also on diagnostic tests detecting the presence of the gene. Such a patent allows the holder to block others from offering diagnostic tests for the gene, regardless of whether the patent holder actually offers the test. Thus, gene patents have the potential
to prevent patients from learning about their own genetic information, thereby impacting their ability to make informed health care decisions.

This Article argues that the Patent Act, as applied, violates the Fifth Amendment Due Process Clause. Individuals have a fundamental liberty interest in knowledge regarding their own genetic information, to the extent that such information will help them make informed decisions regarding medical treatment. Because gene patents are issued by the government and block individuals from obtaining this necessary information, the Patent Act as applied is unconstitutional. This constitutional problem likely extends beyond gene patents into other patents blocking diagnostic testing. Consequently, it is imperative that Congress amend the Patent Act to prevent gene patents from unduly restricting patients access to genetic information.

Dr. P. Sean Morris, Research Fellow, Faculty of Law, University of Helsinki; Visiting Scholar, Fordham University School of Law (Finland)

“Trademarks as Sources of Market Power”

This paper defines the notion of market power and how it affects trademarks in a free market society. I will use legal arguments to consider how important developments in antitrust economics, particular, product differentiation and monopolistic competition have contributed to other developments in the intellectual property/antitrust divide. My goal is to demonstrate that once a better picture of market power is developed, trademarks which are used as a form of differentiation are a source of market power. In the paper, I examine product differentiation and its relationship to trademarks by carefully analyzing the theoretical literature that was developed since Edward Chamberlin’s path breaking work on the Theory of Monopolistic Competition (1933). I also provide a discussion on market power and antitrust litigation to demonstrate how the theory of market power was easily transposed to legal rhetoric and thereby forming a centerpiece in the enforcement of antitrust law. I used a number of cases in the field of trademarks to underscore the key points in my argument that trademarks are a source of market power. These case developments, I argue have contributed to the monopolistic tendencies of trademarks and such tendencies are associated with the theory on market power and product differentiation. To underscore my arguments even further, I study the ABI Beer Corporation and their various trademarks/brands to determine if such brands are a source of market power and effectively give ABI a monopoly on the beer market. I then develop a theory of branded competition and suggest that there is a need for a new direction in trademarks and antitrust law. If recognizing that trademarks are a source of market power, and hence, a core concern for antitrust law and policy, then the legal foundations of the current trademark system would need a radical redesign. If on the other hand, recognizing that trademarks are a source of market power, but does not conflict with antitrust law, and antitrust enforcers are to ignore conducts such as barriers to entry, then antitrust law and trademark law can continue co-exist in the current system, but would be on dubious grounds.

Prof. Liam O’Melinn, Claude W. Pettit College of Law, Ohio Northern University

“The Ghost of Millar v. Taylor”

In 1769 Millar v. Taylor established copyright as a perpetual common law right in England. Millar was formally overruled in 1774 in Donaldson v. Beckett, but its spirit has lived on. Millar has continued to serve as the symbol of the mythology of common law copyright, exerting a quiet but determined influence on the law. Early in the 1960s, in the battle over copyright for sound recordings, John Whicher wrote an elegant article entitled “The Ghost of Donaldson v. Beckett,” which was intended to demonstrate that it was Millar rather than Donaldson that represented the true spirit of copyright law, and that American law should make a more determined effort to follow the course of Millar. This piece is intended
in part as a response to Whicher’s article, and in part as a general assessment of the myth and mythology of common law copyright.

The case for common law copyright in America rests in large measure on the belief that copyright came into existence in England with the importation of the printing press, that its purpose was to protect authors, and that it crossed the Atlantic with American colonists as part of their legal and moral inheritance. I have thus been exploring the character and operation of the common law theory over the ages, beginning in seventeenth-century England (well before the Millar decision itself), and continuing into eighteenth-century England, Scotland, and Ireland. Next I move to America in order to assess the influence that the theory of common law copyright had, if any, on early American copyright law.

This is part of an ongoing project which will conclude by examining the common law theory in a more modern setting, tracking the influence of that durable apparition, the Ghost of Millar v. Taylor.

**Prof. Chidi Oguamanam, Faculty of Law, University of Ottawa (Canada)**

“Intellectual Property, and ‘Intellectual Assets’: Forging Socially Beneficial R&D in Plant Genetic Resources for Food and Agriculture”

Like in the pharmaceutical sector, one of the contemporary challenges of R&D in agricultural biotechnology is how best to attune them to equitably accessible and socially beneficial outcomes for those in direst need. This presentation explores recent changes in the governance of plant genetic resources for food and agriculture (PGRFA) under the auspices of the International Treaty (IT) in the context the pre-existing framework of the now revamped Consultative Group on International Agricultural Research (CGIAR) Consortium. The IT’s implementation of the multilateral system (MLS) of Access and Benefit Sharing (ABS) marks the Treaty Governing Body’s assumption of control and governance of global PGRFA. Recent introduction by the CGIAR of Principles for the Management of Intellectual Assets for PGRFA under the Consortium’s various R&D programs is aimed to plug the gaps in the new IT system. This presentation reflects on the ramifications of pragmatic conceptions of intellectual property within the two systems with regard to their potential to advance socially beneficial outcomes for R&D in agricultural biotechnology.

**Dr. Nahoko Ono, Visiting Scholar, Columbia University School of Law (Japan)**

“Japan’s Approach to FTA-IP”

Japan, as an intermediary country between IP-developed and developing countries, has been struggling to shift more toward the bi-lateral/regional approach from its focus on multinational approach. By closely analyzing the benefits and issues of the shift, I would like to offer how Japan should react on the recent TTP and other bilateral/regional FTAs in light of IP, which would provide the US with a different country’s perspective.

**Prof. Lucas Osborn, Campbell University School of Law**


In the late 18th Century, the First Industrial Revolution mechanized many previously manual tasks. The Second Industrial Revolution, in the early 19th Century, brought standardization and mass production. A Third Industrial Revolution is at hand, brought on by Three-Dimensional printing (sometimes called “additive manufacturing”), that will transform manufacturing in dramatic ways. Soon, 3D printers will print just about anything, anywhere: shoes, clothes, car parts, toys, guns, human body parts, and much more. No longer will cheap labor costs and economies of scale determine production centers. All you need to print almost anything is a printer, “ink,” and software files detailing the item being printed.
3D printing will disrupt almost every area of law, and intellectual property law is no exception. This article analyzes the stresses that will come to three areas of intellectual property law: patents, copyrights, and trademarks. Although disruptions will come in all three areas of the law, the largest disruptions will be in the trademark arena. Trademark owners will be faced with a challenge analogous to copyright owners’ “Napster problem” as individuals will be able to print “name brand” items in the comfort of their home without paying the rights holder for the trademark. Similar stresses will face copyright and patent holders. While the intellectual property owners will not like it, 3D printing (much like peer-to-peer file sharing and computer technology before it) will empower individuals to access and modify content. The empowerment will usher in an era of shifting attitudes toward intellectual property rights. 3D printing may herald a burst of creativity and access: personalized Nike shoes, personalized Gucci handbags, personalized toys for children, parodies of just about anything, etc. But rights holders will do everything in their power to retain control, even if that means quashing creativity and limiting technology (e.g., restrictions on 3D printers). Congress and the courts will need to strike a balance. If they get it right, a new era will flourish. If they get it wrong, they will stifle progress.

Kylie Pappalardo, Ph.D. Candidate, Faculty of Law, Australian Catholic University (Australia)
“The Intersection Between Intermediary Liability in Copyright and Principles of Tort Law”

My presentation will discuss the intersection between intermediary liability in copyright and tort law, with reference to the recent Australian case of Roadshow Films v iiNet [2012] HCA 16.

In 2012, the High Court of Australia decided the case of Roadshow Films v iiNet. The Court found that iiNet, an ISP, was not liable for copyright infringement that occurred over its network by subscribers using peer-to-peer technology to download feature films without licence. The Court was unanimous in its judgment for iiNet, though two judges (in a joint judgment) drew explicitly and extensively from tort law principles in framing their decision. This is curious because Australian courts, unlike US courts, have traditionally been reluctant to acknowledge the influence of tort law in the doctrine of intermediary liability in copyright. Instead, they have insisted that intermediary liability derives from statute, anchoring liability in the words “to authorize” in the Australian Copyright Act.

My research explores the intersection between intermediary liability and tort law in today’s legal environment, using the iiNet judgment as a starting point. I argue that the iiNet judges turned to tort law because of a concern that copyright law lacks the internal restraints necessary to limit the scope of intermediary liability. In drawing on tort law principles, their Honours were able to examine the relationships between the parties involved in a way that copyright law does not allow, considering the nature and proximity of the relationships and what duties and responsibilities each party owed to the others. This is significant, because it provides space to consider the role and responsibilities intermediaries have in relation to copyright users, as well as copyright owners. I argue that tort law principles may provide courts with an avenue for examining intermediary liability claims that is more nuanced and, ultimately, more fair.

Prof. W. Keith Robinson, Dedman School of Law, Southern Methodist University
“The Aftermath of Akamai”

In Akamai Technologies, Inc. v. Limelight Networks, Inc. (decided in August of 2012) the Federal Circuit, sitting en banc, narrowly held that to successfully enforce a patent when more than one party performs all of the steps of a claimed method, the patentee must show that one of the alleged infringers induced the infringement of the other party. However, the opinion failed to answer many of the questions the Federal Circuit asked the parties to brief. For example, the majority passed on the opportunity to clarify the law of joint infringement as it applied to liability for direct infringement under 35 U.S.C. § 271(a). Instead, the Federal Circuit simply acknowledged that doctrinal problems arise “when the acts necessary to give rise
to liability for direct infringement are shared between two or more actors.” In sum, the court overruled its
decisions in BMC and Muniauction and established a new test under inducement for when more than one
party performs steps in a method claim. Judges in the minority issued two dissenting opinions. In one
dissent, Judge Linn, joined by three other judges, argued for the preservation of the direction or control
test and asserted that the test provides for a finding of liability where there is a joint enterprise. In the
second dissent, Judge Newman, writing for herself, argued that there should be liability for infringement
whenever one or more parties perform the steps of a claimed method.

Some commentators have claimed that the 6–5 decision of the Federal Circuit did more harm than good.
As a result, where inducement is not present, parties could potentially use and benefit from new
interactive technologies without liability for patent infringement. Several commentators have suggested
that patentees can avoid this fate by drafting better claims. Unfortunately, given today’s advances in
technology and the ability of method claims to better define an invention, even expert claim drafting
cannot protect a patentee from an unauthorized use of their innovative method.

Instead of judicially narrowing loopholes with respect to joint infringement, they should be closed and the
law should be clarified. This article analyzes the development of joint infringement theory, including the
Federal Circuit’s recent rehearing of its own decisions and district court cases that have applied the new
rule under Akamai. This article shows that the Federal Circuit’s development of joint infringement case
law is ripe for legislative intervention. Further, I argue that the fractured opinion in Akamai provides a
basic template for the creation of a new contributory infringement provision for method claims. The goal
of this approach is to increase the likelihood that the law will protect deserving interactive methods from
infringement.

Prof. Zvi Rosen, Adjunct Professor, New York Law School
“Survey of Copyright Law for Pre-1972 Sound Recordings”

Up to 1972, sound recordings were excluded from federal copyright protection, leading to a patchwork of
state protections. Although effective February 15, 1972 sound recordings were granted federal protection,
this measure was not retrospective, and state laws remained the relevant legal regime for sound recordings
made until that date. This has lead to the assertion of perpetual copyright in older sound recordings,
including those made before 1923 (such as Caruso and Sousa’s recordings). Accordingly, there has been a
move to federalize protection for all sound recordings. However, while the caselaw in a few states, most
notably New York, is relatively clear, little is known about law regarding sound recordings in most states.
This project provides a 50-state survey of state laws regarding sound recordings, and further provides
insight into how many states have developed a system which is much more forgiving of noncommercial
infringement than federal law is, even as they continue to deal harshly with commercial-grade infringement.

Prof. Karen E. Sandrik, Willamette University College of Law
“Formality in Patent Licensing”

There is a lively debate within the patent system over the role (if any) that common law systems should
play in the development and application of patent law. In the past, this debate has predominately focused
on the role of property law. In recent years, however, the focus has shifted to the role of contract law. The
central interaction between contract law and patent law occurs when parties enter into an enforceable
contract, a patent license or patent assignment, to transfer some interest or right to patented technology.

This Article argues that patent scholars are missing a deeper, more fundamental issue when integrating
the values of contract law into patent licensing. Even if we resolve how the common law of contract
should affect the path of patent law, we must still determine the desired level of formality in the law of
patent licensing. This Article argues that the Federal Circuit should adopt the level of formality found in Article 9 of the UCC—a standard that is formal, but forgiving. And, further, that the Federal Circuit should endorse a different level of formality when the patent license is between an inventor and employer/company rather than between two companies. These tailored levels of formality in patent licensing will promote certainty and predictable in the patent system.

Prof. Joshua Sarnoff, DePaul University College of Law
“Rethinking Application Drafting and Examination”

A number of events are converging to drive new thinking regarding patent application drafting and examination. First, the PTO now has new fee-setting authority, which it can use to direct examination behaviors in ways it views favorably (including the potential to discourage re-filing of applications). Second, the PTO has proposed a series of measures and asked whether they “should” be adopted as good practices for application drafting. Third, some academics have recently suggested a number of measures that would and should (or that would not or should not) be adopted to improve patent quality. This article takes stock of these developments and suggests adopting some of the proposed measures and some additional measures, which may be viewed as preferable to the existing system and various other proposed alternatively only if we have first settled on what the purposes of applicant drafting and government examining behaviors should be.

Prof. Martin R.F. Senftleben, VU University Amsterdam (The Netherlands)
“Trademark Law and the Public Domain”

Initiatives aiming at the preservation of the public domain constitute an important element of the WIPO Development Agenda. With the Study on Misappropriation of Signs (WIPO Document CDIP/9/INF/5 of 14 March 2012), the international debate on how to preserve a rich and accessible public domain has reached trademark law. It raises fundamental questions about the relationship between the rationales of trademark protection and the need to safeguard the public domain. How to define the public domain in relation to the trademark system? Against this background, the talk will discuss the notion of the public domain with regard to trademark law and seek to identify legal mechanisms that can be employed to safeguard the public domain. It will be argued that a broad conception of the public domain is appropriate – a conception which, besides exclusions from protection, includes freedoms of use resulting from limitations and exceptions. In this way, the impact of trademark law on the public domain can be assessed appropriately. Moreover, the international debate on the issue can be broadened. Four categories of preservation tools – the absolute bar to trademark protection, the exclusion because of a lack of distinctiveness, inherent limits of exclusive rights and the adoption of exceptions – can be distinguished on this basis.

Prof. Seagull Haiyan Song, Loyola Law School—Los Angeles
“Protection of Audio-Visual Works in China: A Hybrid Model”

The paper addresses one of the most important and controversial topics of Chinese Copyright Law Reform—Copyright Protection for audio-visual works. The fact that authors/creators of an audio-visual work (such as director, writer and producer) might not necessarily be the copyright owner of the audio-visual work, thus losing the opportunity to share the commercial success of their created work, has drawn criticism from creators in the entertainment industry in China. Industries representing directors and writers therefore have lobbied for legislative changes in the Copyright Law Reform, shifting the copyright ownership of audio-visual works from the current statutory language “studio-owned” to “creators-owned”, or leaving the ownership to be decided by contracting parties. Not surprisingly, studios are strongly resisting to such proposed changes.
The paper will start with an overview of different models of audio-visual works protection around the world, comparing the European model (Germany and France), which are more focused on protecting moral rights of the creators, with the US model (a model more focused on protecting the economic interests of the investors). Then the paper will address problems existing in the current Chinese copyright law system with regard to protection of audio-visual works. Finally, the author will propose a hybrid model for the Chinese system, where the copyright ownership of audio-visual works will still vest in studios who invest resources and money to produce the movies, but producing a more balanced and sophisticated compensation scheme to creators so as to ensure their personal and economic interests are sufficiently addressed.

Prof. Harry Surden, University of Colorado Law School
“Technological Costs as Law in Intellectual Property”

Intellectual property (IP) laws can change in substantive scope when technology changes. Such laws often contain hidden dependencies that link legal scope to external technological developments. This dynamic occurs when IP laws are premised upon unarticulated assumptions about technological feasibility. Many current IP laws implicitly depend upon transitory technological limitations in this way and may thus be vulnerable to subtle technologically-induced shifts in substantive scope. This is the problem of “technological dependence.”

This Article’s model reveals previously unobserved technological dependencies in IP law. Such dependencies arise because “technological costs” are playing an under-acknowledged, and implicit, role in regulating IP goods alongside positive law. This is different than the usual view of costs, which are generally understood as passive manifestations of inefficiency, and not as performing any functional role. IP law implicitly depends upon activities being costly, such as it being difficult to reproduce copyrighted works, to balance competing goals, for example, the incentive to create IP goods balanced against access to existing goods. When emerging technologies render these activities significantly less costly, IP regulatory equilibria can become destabilized. This lens also reveals a new class of “policy levers” to calibrate IP laws by selectively reducing activity costs.

This same model illuminates the way in which costs can implicitly protect core IP values. Costs constrain activities. However, it may actually be important to some societal group’s core interests that certain activities that are currently costly remain costly. Emerging technologies tend to reduce costs, and such costs may have been implicitly protecting IP values in ways that we might not fully understand until after they are gone. This is the problem of “technological erosion” of IP values. This raises a provocative question: should we think of there being unwritten IP rights “embedded” in the technological limits of an earlier era

Dr. Nicolas Suzor, Senior Lecturer, Faculty of Law, Queensland University of Technology (Australia)
“Crowdfunding for the Commons”

This project examines the conditions in which collective action can sustainably coordinate and fund cultural production. From large library consortia funding the costs of open access to scholarly publications, to small-scale crowdfunding campaigns to fund individual projects, new models of cooperation are enabling cultural production without the necessity of exclusivity. These efforts provide an interesting challenge to the incentives/access paradigm at the heart of copyright law. This research attempts to examine the conditions of success in these commons-based collective action models, including the characteristics of successful projects and the norms that facilitate cooperation amongst particular communities. By attempting to examine these projects through a common framework, I begin
the task of testing whether there are more generalizable inferences that can be drawn, and the impact this might have on copyright theory and doctrine.

Prof. Greg R. Vetter, University of Houston Law Center
“Are Prior User Rights Good for Software?”

The America Invents Act (“AIA”) gave U.S. patent law a general prior user rights defense. Styled as a defense for a “prior commercial use,” the AIA defense replaces a decade-old “earlier inventor” defense that arose from a software system patent infringement case and applied only for business methods. This article assesses the AIA’s prior use defense from the perspective of software technology in view of the contentious issues around software patenting. It concludes, first, that courts should interpret the defense, or congress should alter it, to ensure its efficacy for software. Facially, the defense suggests a manufacturing motif, although its applicability to commerce in software may be stronger than suggested at first glance. Second, this article assesses the potential impact of a prior use defense on intellectual property protection in software. Some have posited that, as a general matter, the defense may create an incentive to favor trade secrecy over patenting. Regardless of the strength of that logic for other technologies, it seems lacking for software. While the use of the defense for software patent infringement will depend on the defense’s efficacy, there is also the question as to the defense’s impact on software patenting. One potential impact is on defensive patenting: will software firms engage in less defensive patenting if there is an efficacious prior use defense?

Prof. David Welkowitz, Whittier Law School
“The Virtues and Vices of Clarity in Trademark Law”

This article examines the issue of trademark law’s emphasis on case by case contextual analysis, with numerous layers of multifactor analyses. One result is that trademark law may be subject to overreaching, particularly regarding free speech and possible overlap with other areas of intellectual property law. Moreover, as a result of the lack of predictability, desirable activity may be deterred because of a fear of liability or simply a fear of an expensive lawsuit that will be difficult to terminate at an early stage. The article examines possible solutions to this problem, including statutory clarifications and presumptions. It concludes that presumptions are a better solution to the problem, because they retain a certain level of contextual flexibility, while imposing a clearer standard in many cases. The article then suggests some presumptions that might be used to clarify several aspects of trademark law.

Prof. Steven R. Wilf, University of Connecticut School of Law
“Patent and Social Movements in Late 19th Century America”

From the mid 1880s to the mid 1890s, a particular culture of patents emerged in the American prairie lands which combined a political economy of citizenship, anxieties about the power of industrial combinations, and a belief that technological innovation and mastery might well be critical to the construction of the autonomous self. The commonplace legal historical approach to intellectual property has been to concentrate upon either the moments when large statutory schemes were passed by legislatures or upon landmark cases. This paper, in contrast, focuses upon a fin de siècle outburst of imaginings—proposed statutes, cultural, political and economic critiques of existing patent doctrine, and utopian conceptions of reform to argue for a late nineteenth-century watershed in the making of American patent law. This historical moment was prompted by an onslaught of harassing infringement suits concerning barbed wire, fencing, and wells, established a movement against patent law that became a major political issue in the agricultural mid-Western states beginning in the 1880s. Farmers organized under the larger agrarian movement of the Grange. Activists deluged Congress with petitions, proposed legislation to limit the ability of patent holders to sue, and created legal defense funds. Prairie populism mixed with a campaign against patent misuse.
Drawing upon the social movement literature, I will examine issues of mobilization, association and group dynamics, and the relationship of patent reform to other reform movements. This past is particularly relevant today as we witness a resurgence of intellectual property outlaws or not-so-primitive digital rebels. The patent wars—the late nineteenth-century prairie agrarian revolt against intellectual property—underscores how resistance to the regulation of knowledge can emerge among social groups as they come into contact with the patent system.