The Object and Purpose of Intellectual Property

Victoria University of Wellington, 23-26 October 2017
Tēnā Koutou and Welcome from ATRIP President

Dear Friends and Colleagues,

Welcome to Wellington and to the 36th ATRIP Congress. The theme of this Congress is the object and purpose of intellectual property.

What is the purpose of intellectual property and who do the laws serve? There are some well-known answers to these questions, but the answers are never static just as innovation and creativity are dynamic. Much of the debate around the parameters of intellectual property protection and the extent of how flexible the law should be, at both national and international levels, relates to policies and views about what the law is supposed to achieve. Also relevant to the debate is if the law reflects its underlying justifications and whether those justifications come to fruition or whether other outcomes are occurring.

The TRIPS Agreement includes a range of objectives and principles. Broadly, TRIPS added explicit trade-related concerns (including both export and development interests) to the existing international rationales and the underlying domestic policy rationales of intellectual property. Subsequent to TRIPS, trade and investment agreements that often aim to increase protection and enforcement and reduce TRIPS flexibilities have emerged.

The relevance of intellectual property as a set of discrete rules is arguably both expanding and shrinking. It is practically trite to point out that there are complexities in how intellectual property interacts with changing technologies and other areas of law in many fields. It is, therefore, more important than ever to analyse how the object and purpose of intellectual property applies to new and fast-changing areas such as big data, biotechnology and social media.

The relevance of the object and purpose of intellectual property might be assessed by looking at who is involved in the creation, use and dissemination of intellectual property and the outcomes of rights and uses for those actors. This congress will include panels that discuss the object and purpose of intellectual property from a variety of perspectives.

I am delighted to welcome you to Wellington and on behalf of the Executive Committee we hope you enjoy the 36th annual ATRIP congress.


ATRIP Executive Committee

President: Susy Frankel
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Location
Law School, Victoria University of Wellington, Old Government Buildings, 55 Lambton Quay, Wellington

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1. Connect to ‘Victoria’ Wi-Fi
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4. Enter your email address and after reading the terms and conditions, tick the ‘agree’ box
5. Press ‘Register’, and then ‘Sign On’ to complete the sign in process.

Transport
Wellington is excellently served by public transport. The main Lambton Interchange for buses is adjacent to Rutherford House. Full timetable information is available at www.metlink.org.nz. If you need a taxi, there are ranks on Lambton Quay – to your left as you exit the main gates of the School. To book a taxi call: Corporate Cabs 04 499 46 49; or Wellington Combined Taxis 04 384 44 44. If you are travelling in a large group, it is much more economical to book a shuttle through Super Shuttle on 0800 748885.

Health and Safety
In the event of an emergency please follow the directions of the Campus Care staff and Wardens. In the event of an evacuation leave by the nearest exit and go to the space between the Law School and Rutherford House. Contact for the Campus Care Control Room is 04 463 9999.

Emergency Contact
Ambulance, Fire or Police 111 (when dialling from a University phone press 1 first)
Conference Programme

Monday 23 October

2.00-5.00pm
› ATRIP Executive Committee Meeting

5.00-7.30pm
› Opening reception
Location: Ground floor, Victoria University of Wellington, Faculty of Law, 55 Lambton Quay, Wellington.

Tuesday 24 October

Location: Lecture Theatre 1 (GBLT 1), Victoria University of Wellington, Faculty of Law, 55 Lambton Quay, Wellington.

8.30am
› Mihi (Māori Welcome)
  Rawinia Higgins, Deputy Vice-Chancellor Maori, Victoria University of Wellington

› Welcome
  Mark Hickford, Pro Vice-Chancellor and Dean of Law, Victoria University of Wellington
Opening speakers

Chair: Susy Frankel, ATRIP President
- Sherif Saadallah, Executive Director, WIPO Academy
- Annette Kur, Max Planck Institute for Innovation and Competition, ATRIP president 2007-2009

Session 1  GBLT1

9.00-10.30am: The Evolving International and Regional Rules

Chair: Sam Ricketson, University of Melbourne, Australia

- Brexit and IP: the Great Unravelling?
  Graeme Dinwoodie, Faculty of Law, University of Oxford, UK
  Rochelle Cooper Dreyfuss, NYU School of Law, USA

- Incrementalism and Intellectual Property Reform in India
  Arpan Banerjee, Jindal Global Law School, India

- A TWAIL-Constructivist Critique of the IP and Development Divide in the Age of Innovation
  Bassem Awad and Marsha Simone Cadogan, Centre for International Governance Innovation, Canada

- Human Rights, Intellectual Property Disputes, and International Investment Agreements
  Emmanuel Kolawole Oke, Edinburgh Law School, University of Edinburgh, UK

- Intellectual Property as Public Policy
  Susan Sell, RegNet, Australian National University, Australia

Morning Tea 10.30-11.00am
Session 2  GBLT1

11.00am-12.45pm: What is Copyright For?
Chair: Ruth Okediji, Harvard Law School, USA

▷ Intellectual Property as Seen by Barbie and Mickey:
The Reciprocal Relationship of Copyright and Trademark Law
Jane Ginsburg, Columbia Law School, New York, USA

▷ How International Copyright Assisted American Corporate
   Capitalism and Led to the Decline of the Australian Feature
   Film Industry
Kathy Bowrey, Faculty of Law, University of New South Wales, Australia

▷ The Right to a Reasonable Exploitation Concretized – An Incentive
   Based Approach
Ole-Andreas Rognstad, Department of Private Law, University of Oslo, Norway

▷ New Neighbouring Rights for Digital Press Publishing
Valentina Moscon, Max Planck Institute for Innovation and Competition, Germany

▷ Limitations for Text and Data Mining and Teaching in the
   Copyright in the Digital Single Market Draft Directive
Raquel Xalabarder, School of Law and Political Science, Oberta de Catalunya University, Spain

Lunch 12.45-1.45pm
Session 3A (parallel)  GBLT1

1.45-3.30pm: The Expanding Nature of Trade Marks and Geographical Indications

*Chair: Christophe Geiger, Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg, France*

- **Online Trading, Internet Advertising and Mark Infringement: Trends of Consumer Protection by African Courts**
  Joelle Nwabueze, Enugu State University of Science and Technology, Nigeria

- **Human Rights and the Object and Purpose of International Trade Mark Agreements**
  Genevieve Wilkinson, University of Technology, Sydney, Australia

- **How 3D Printing Challenges the Consumer Protection Rationale of Trademarks**
  Bram Van Wiele, Intellectual Property Unit, University of Cape Town, South Africa

- **‘To Kill a Trade Mark’ Wartime Lessons on the Objects and Purposes of Trade Mark Law**
  Catherine Bond, Faculty of Law, University of New South Wales, Australia

- **A Toast to Geographical Indications: The Market Battle of Champagne and Prosecco**
  Henry Biggs, Washington University, St Louis, USA
Session 3B (parallel)  GBLT2

1.30-3.30pm: Object and Purpose in the Digital Realm
Chair: Susan Corbett, School of Accounting and Commercial Law, Victoria University

› ‘Going for Gold’: A Legal and Empirical Case Study into 3D Scanning, 3D Printing and Mass Customisation of Ancient and Modern Jewellery
Dinusha Mendis, Centre for Intellectual Property Policy and Management (CIPPM), Bournemouth University, UK

› Legislative Measures Related to Online IPR Infringements: Keeping Up with IPRs Role and Purpose
Ana Nordberg, Faculty of Law, University of Copenhagen, Denmark
(co-author) Knud Wallberg, Faculty of Law, University of Copenhagen, Denmark

› 3D Printing and Intellectual Property Futures
Angela Daly, Faculty of Law, Queensland University of Technology, Australia

› Do we still need IP Offices?
Nicolas Binctin, Université de Poitiers, France

› Digitally-Manipulated Personal Photographs: Tensions, Taxonomies and Treatments
S Che Ekaratne, School of Law, University of Canterbury, New Zealand

› The Purpose and Characteristics of Copyright Law in Internet Era
Weijie Huang, Faculty of Law, University of Hong Kong
(co-author) Yahong Li, Faculty of Law, University of Hong Kong

Afternoon Coffee 3.30-3.50pm
Session 4  GBLT1

3.50-5.20pm: The Many Purposes of Trade Marks
Chair: Reto Hilty, Max Planck Institute for Innovation and Competition Law, Germany

› Non-traditional Trademarks and Inherently Valuable Expression
  Lisa Ramsey, School of Law, University of San Diego, CA, USA

› ‘Market Definition’ as a Tool for Assessing Anti-Competitive Effects of Registering Non-Traditional Trade Marks
  Lavinia Brancusi, Faculty of Canon Law, Department of Civil Law, Card. Stefan Wyszynski University, Warsaw, Poland

› Inventing Harm: Reassessing the Origins and Reception of the First Trade Mark Anti-Dilution Statutes
  Michael Handler, Faculty of Law, University of New South Wales, Australia

› Trademark Law and the Public Interest (in the Luxury Industry): Can Anti-Dilution Protection Promote Higher Quality Products?
  Irene Calboli, School of Law, Singapore Management University, Singapore and Texas A&M University School of Law, USA

› What are Trade Marks For? A Case Study in Coffee
  Megan Richardson, Melbourne Law School, University of Melbourne, Australia
  (co-author) Jill Klein, Melbourne Business School, University of Melbourne, Australia

Day 1 closes 5.20pm

Evening events (included as part of your conference registration)

Weta Workshop tour and dinner

Transport to pick delegates up from Victoria University of Wellington, Faculty of Law at 5.30pm and take to the Weta Workshops and Roxy Cinema.
Wednesday 25 October

Session 5  GBLT1

8.45-10.30am: Reconsidering Incentives in Times of Social and Cultural Change
Chair: Abbe E L Brown, School of Law, University of Aberdeen, UK

› Copyright and Distributive Justice
  Justin Hughes, Loyola Law School, Los Angeles, CA, USA

› What Can a History of Copyright and Cartography Tell Us about the Object and Purpose of Intellectual Property Law?
  Isabella Alexander, Faculty of Law, University of Technology, Sydney, Australia

› Overlapping Incentives and the Persistent Conundrum of Free Trade in Intangibles – ISDS and International IP
  Barbara Lauriat, The Dickson Poon School of Law, King’s College London, UK

› The Object and Purpose of Intellectual Property: A Blessing or a Curse for TK?
  Lida Ayoubi, Auckland University of Technology, New Zealand

› Intellectual Property and the Criminal Law
  Kimberlee Weatherall, Law School, University of Sydney, Australia

› Intellectual Property Rights in the Recreational Cannabis Market: Craft or Commodity?
  Jeremy de Beer and Alyssa Gaffen, University of Ottawa, Canada

Morning Tea 10.30-11.00am
Session 6  GBLT1

11.00am-12.45pm: From Trade Secrets to Patent Purpose

Chair: Alexander Peukert, University of Frankfurt, Germany

- The Problematic Object and Purpose of Trade Secret Protection
  Niklas Bruun and Nari Lee, Hanken School of Economics, Helsinki, Finland

- Encouraging ‘Openess’ in Genomics Research:
  The Impact of Trade Secrecy
  Jane Nielsen and Dianne Nicol, Faculty of Law, University of Tasmania, Australia

- The Changing Face of Patents in Biotechnology:
  The Case of Biofabrication
  Pheh Hoon Lim, Law School, Auckland University of Technology, New Zealand
  (co-author) Phoebe Li, Sussex University, UK

- Thinking beyond the TRIPS Agreement about Reshaping the Patent Term
  Milton Lucídio Leão Barcellos, Antonio Meneghetti Law School and Leão Intellectual Property, Brazil

- Expertise, Efficiency, Equity – searching for an appropriate degree of bifurcation of patent infringement and validity
  Christoph Rademacher, Waseda University School of Law, Tokyo

- Searching for Optimal Response to PAEs’ Excessive Enforcement Practices
  Rafał Sikorski, Adam Mickiewicz University, Poznań, Poland

Lunch 12.45-1.45pm
Session 7A (parallel)  GBLT1

1.45-3.30pm: Contouring Copyright Purposively

Chair: Silke von Lewinski, Max Planck Institute for Innovation and Competition, Germany

- United in Diversity or Divided in Unity? – In Search of a Lost Object of Copyright Protection
  Ewa Laskowska, Faculty of Law, Jagiellonian University, Kraków, Poland

- Access to Education Vis-à-vis Protection of Copyright: Indian Copyright Jurisprudence
  Vandana Singh, School of Law and Legal Studies, Guru Gobind Singh Indraprashta University, New Delhi, India

- Copyright as an Access Right: Rethinking Copyright Law as a Vehicle for Cultural Participation and Social Progress
  Christophe Geiger, Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg, France

- Copyright Scope and Copyright Misuse
  Ann Bartow, Franklin Pierce Center for Intellectual Property, School of Law, University of New Hampshire, USA

- Collective Management Systems Vis-À-Vis Competition Law and Policy, the European Response
  Valeria Falce, Professor of Law, European University of Rome, Italy
  Maria Letizia Bixio, Post Doc Researcher, European University of Rome, Italy
Session 7B (parallel)  GBLT2

1.45-3.30pm: Patents Objective(s)
Chair: Daniel Gervais, Vanderbilt Law School, USA

- Data exclusivity as an instrument of legal protection of pharmaceuticals
  Žaneta Pacud, The Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland

- Patent Invalidation and Legal Certainty
  Christoph Ann, Technical University of Munich, TUM School of Management

- Stating the Obvious or Just Seeking Clarity? A Comparative Analysis of Objects and Purposes Clauses in Key Patent Jurisdictions
  Natalie P Stoianoff, Faculty of Law, University of Technology, Sydney, Australia

- The Purposes of Patent System and their Interactions with Green Technology Innovation Policies
  Yu Xiang, Chinese-German Institute for Intellectual Property, School of Management, Huazhong University of Science & Technology, China

- Reframing the Software and Business Method Patents Debate around Disclosure and Reuse
  James Scheibner, Faculty of Law, University of Tasmania, Australia
**Session 7C (parallel)  GBLT3**

**1.45-3.30pm: Development and the Interpretation of Rules**

*Chair: Peter Yu, Texas A&M University School of Law, USA*

- **The Role of Intellectual Property and Universities in Fostering Regional Socio-Economic Development and Regional Competitiveness**
  Helen Yu, Faculty of Law, University of Copenhagen, Denmark

- **An Update on Intellectual Property in Russia**
  Ivan Zenin, Moscow State University, Russia

- **Making Derivative Works Without Authorisation and the Interpretation of ‘Originality and Creativity’ under Thailand’s Copyright Law**
  Chongnang Wiputhanupong, School of Law, Sripatum University, Thailand

- **The Economic Considerations in Shaping Intellectual Property**
  Christian Schmitz Vaccaro, Universidad Católica de la Santísima Concepción, Chile

- **Creative Industries in Malaysia: Copyright Reform, Incentive Theory and Industrial and Trade Politics**
  Ida Madieha Abd. Ghani Azmi, Department on Civil Law, International Islamic University, Malaysia
  Rokiah Alavi, Department of Economics, International Islamic University, Malaysia

**Afternoon tea 3.30-3.50pm**
Session 8  GBLT1

3.50-5.35pm: The Sui Generis and Intellectual Property’s Frontier
Chair: Jessica Lai, School of Accounting and Commercial Law, Victoria University

  Margo Bagley, Emory University School of Law, USA

› Licensing of Traditional Knowledge in Africa
  Enyinna S Nwauche, Faculty of Law, Rhodes University, Grahamstown, South Africa

› Protection of Traditional Knowledge: Finding A Legal Framework for Bangladesh
  Towhidul Islam, Department of Law, University of Dhaka, Bangladesh
  Righting Wrongs: Rights in Traditional Knowledge as Corrective Justice
  Evana Wright, Faculty of Law, University of Technology, Sydney, Australia

› Non-conventional Copyright: do New and Non-traditional Works Deserve Protection?
  Enrico Bonadio, The City Law School, London, UK
  Nicola Lucchi, Jonkoping International Business School, Sweden

› Where is the Design? To Capture the Essence of EU Design Protection and Verify its Adequacy
  Anna Tischner, Faculty of Law, Jagiellonian University, Krakow, Poland
5.35pm: Essay competition presentation, sponsored by FICPI

Chair: Graeme Dinwoodie, Faculty of Law, University of Oxford, UK

Essay Prize Winner, Verity Dawkins, University of Tasmania, Australia

Day closes 6.00pm

Evening events (included as part of your conference registration)

Gala dinner, Te Papa Tongarewa, Museum of New Zealand

Transport to pick delegates up from hotels from 6.30pm and take to Te Papa Tongarewa, Museum of New Zealand for the Gala Dinner.

Thursday 26 October

Session 9 GBLT1

9.00-10.45am: National Policy Drivers

Chair: Tana Pistorius, University of South Africa

- The Object and Purpose of Intellectual Property: a National, Creative, Adversarial Approach
  Abbe E. L. Brown, School of Law, University of Aberdeen, UK

- IP Protection in China in the Context of Industry 4.0
  Du Ying, Central University of Finance and Economics, Beijing, China

- Access to Knowledge and the Purpose of IP Protection
  Alfred Früh, Center for Information Technology, Society and Law, University of Zurich, Switzerland
Session 10  GBLT1

11.00am-12.00pm: Panel Discussion – Academic Publishing

Chair: Annette Kur, Max Planck Institute for Innovation and Competition, ATRIP President 2007-2009

Panellists: Jane Ginsburg, Columbia Law School, New York, USA
Sherif Saadallah, Executive Director, WIPO Academy
Kimberlee Weatherall, Law School, University of Sydney, Australia
Jeremy de Beer, University of Ottawa, Canada

This panel will discuss a series of questions about the evolving challenges of academic publishing. Discussion will cover the publishing of teaching texts and research and the issues raised by books (authored and edited) and the opportunities of open access.

ATRIP General Assembly 12.00-12.30pm

Susy Frankel (President)
Alexander Peukert (Treasurer)
Daniel Gervais (Incoming President)

Closing lunch 12.30pm

Optional tour events

Please see our website for more details:
www.victoria.ac.nz/atrip/programme/optional-activities
Mihi (Māori Welcome)

Rawinia Higgins, Deputy Vice-Chancellor Maori, Victoria University of Wellington

Professor Rawinia Higgins was appointed Tumu Ahurei / Deputy Vice-Chancellor (Māori) of Victoria University of Wellington in 2016. She was previously Victoria’s Assistant Vice-Chancellor (Māori Research) and Head of School for Te Kawa a Māui / School of Māori Studies. Professor Higgins came to Victoria as a senior lecturer in 2009 after holding academic positions at the University of Otago for 12 years. Her research expertise is Māori language revitalisation and, more specifically, language planning and policy.

Professor Higgins is a member of the Waitangi Tribunal, a board member of Te Mātāwai, Ngā Pae o Te Māramatanga (Māori Centre of Research Excellence), and is the Deputy Chair of the Māori Knowledge and Development PBRF portfolio.

In 2015, the Minister for Māori Development appointed her chair of the review of the Māori Language Bill and she helped shape the legislation enacted in April 2016. Te Mātāwai was created as part of the new legislation and governs the Māori Language Strategy dedicated to whānau, hapū, iwi and Māori communities. In 2017, Rawinia was awarded the Te Waitī award for te reo and tikanga at the Matariki awards.
Welcome

Mark Hickford, Pro Vice-Chancellor and Dean of Law, Victoria University of Wellington

Professor Mark Hickford was appointed as Pro Vice-Chancellor and Dean of Law in 2015. He is responsible for the Faculty of Law’s academic programme, and for maintaining and enhancing the Faculty’s reputation as the pre-eminent centre of legal research in New Zealand, and as one of the top 50 Law Schools in the world.

Professor Hickford has held a range of senior management and leadership roles in the public and private sectors, including being in the Prime Minister’s Policy Advisory Group in the Department of the Prime Minister and Cabinet. He spent eight years as a Crown Counsel at the Crown Law Office, specialising in public law, the Treaty of Waitangi, Crown-Māori relations and natural resources law.


Professor Hickford has held visiting positions at Nuffield College, University of Oxford, as well as the Centre for Public Law at Victoria University of Wellington. He has been a member of the former Legislation Advisory Committee.

Professor Hickford graduated from the University of Auckland with a Bachelor of Arts and a Bachelor of Laws with Honours and has a doctorate from the University of Oxford.
Opening speakers Chair

Susy Frankel, ATRIP President

Professor Susy Frankel is Chair of Intellectual Property and International Trade, and Director of the New Zealand Centre of International Economic Law, at Victoria University of Wellington. She is the President of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) 2015–2017.

Since 2008 she has been Chair of the Copyright Tribunal (NZ). Susy held an appointment as Assistant Commissioner of Trade Marks, Patents and Designs, Hearings Officer for the Intellectual Property Office of New Zealand, from 1998-2006. She is a member of the editorial boards of the Journal of World Intellectual Property Law and the Queen Mary Journal of Intellectual Property and a member of the board of the New Zealand Pacific Economic Co-operation Council. She teaches copyright, trade marks, patents, international intellectual property and international trade law. She has been a Visiting Professor at several universities including as Reinhold Cohn Chair at the University of Haifa, University of Iowa, University of Western Ontario, and as a Senior Fulbright Scholar and Senior Hauser Global Research Fellow at New York University Law School.

Susy’s scholarship focuses on international intellectual property and particularly treaty interpretation and the protection of indigenous peoples’ knowledge and innovation.

Opening speaker

Sherif Saadallah, Executive Director, WIPO Academy

Mr. Sherif Saadallah, Executive Director, World Intellectual Property Organization (WIPO) Academy, is a national of Egypt and joined the International Bureau of WIPO in April 1991, as Special Assistant, Office of the Director General.

In January 1993, he was transferred to the Development Cooperation and External Relations Bureau for Arab Countries. Promoted as Head of that Bureau in November 1995 and became Director of that Bureau in 1997. In December 2003, he was appointed as Executive Director of the Office of Strategic Use of Intellectual Property for Development (OSUIPD) and supervised the work of five Divisions in WIPO, namely, the Intellectual Property and Economic Development Division, the Small and Medium-Sized Enterprises Division, the Intellectual Property and New Technologies Division, the Creative Industries Division, and the Division for Public Policy and Development.

Mr. Saadallah was responsible for the process that led to the successful adoption of the WIPO Development Agenda in 2007. In 2008 Mr. Saadallah was appointed Executive Director of the Department of External Relations where he supervised the work of the Intergovernmental Organizations and Partnerships Section and the Non-Governmental Organizations and Industry Relations Section, as well as the WIPO Coordination Office in New York. In January 2015, Mr. Saadallah became the Executive Director of the WIPO Academy.

Before joining the International Bureau, Mr. Saadallah served as a diplomat with the Ministry of Foreign Affairs of Egypt. He worked in the Permanent Mission of Egypt in Geneva from 1986 to 1991. Mr. Saadallah is seconded from the Egyptian Foreign Service to WIPO and has the rank of Ambassador in his national service. He graduated from the American University in Cairo, Egypt, and has studied at the Diplomatic Institute for International Studies in Cairo and at the Institut Universitaire des Hautes Études Internationales in Geneva. He speaks Arabic, English, French and Spanish.
Opening speaker

*Annette Kur, Max Planck Institute for Innovation and Competition, ATRIP president 2007-2009*

Professor Kur was senior member of research staff and Head of Unit at the Max-Planck-Institute (MPI) for Intellectual Property, Competition and Tax Law until 31 July 2015. She is affiliated professor University of Stockholm and honorary professor at the University of Munich (LMU). She teaches also at Munich Intellectual Property Law Center (MIPLC), and is a member of foreign faculty, Santa Clara University (CA). She was a visiting professor (Hauser Global Law School Program) at NYU, New York, as well as at several European universities and at the National University of Singapore (NUS). She was President of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) for the term 2007-2009. Professor Kur is the author of books and numerous articles in the field of national, European and international trademark, unfair competition and industrial design law as well as international jurisdiction and choice of law.
Session 1

The Evolving International and Regional Rules

GBLT1
Session 1 Chair
Sam Ricketson, University of Melbourne, Australia

Sam Ricketson is a Professor of Law at the Melbourne Law School, and formerly practised part-time as a barrister at the Victorian Bar, principally in the area of intellectual property. He holds degrees from the Universities of Melbourne and London, and is a Fellow of the Academy of Social Sciences of Australia and the Australian Academy of Law.

Sam has written, taught and advised widely across all areas of intellectual property law, both nationally and internationally, and has also held various professional as well as governmental appointments in the intellectual property area, including membership of the Commonwealth Copyright Tribunal. He is currently a panel member of the World Intellectual Property Organisation’s dispute resolution body in relation to domain names.
Brexit and IP: The Great Unraveling?

Graeme Dinwoodie, Faculty of Law, University of Oxford, UK and Rochelle Cooper Dreyfuss, NYU School of Law, USA

In theory, exit from Brexit will free the United Kingdom from the constraints and burdens of EU membership. It will transfer sovereignty back to the people from the technocratic rule of Brussels; replace the jurisprudence of the Court of Justice with the adjudicative power of national courts; and allow the UK to tailor its market regulation in the particular exigencies of the UK economy.

Focusing on intellectual property law, we explore how well the rhetoric of Brexit comports with the reality and the institutional economics of nation-state lawmaking in an era of global trade and digital communication technologies. Since the critique of one-size-fits-all IP regimes is well-known and widely accepted, some might think that this is an area where the UK would quickly move to restore self-rule and put control over access to cultural and technological materials into the hands of a democratically elected legislature, accountable to the people for its actions.

And yet global intellectual property rights are intimately associated with the incentive system of the Knowledge Economy writ large. Moreover, intellectual property mediates the infrastructure of the modern-global-business environment. In this climate, worldwide protection is necessary. It protects innovators from free-riding rivals and permits firms to decouple research, production, and manufacturing functions and aggregate consumer demand. It is thus not surprising that nations with robust creative sectors embed themselves in a rich weave of international, regional and bilateral obligations. For the UK, that includes participation in the EU, for that single political alignment situated the UK within that transnational web. Because exit would present a significant loss of the efficiency gains, the UK will, to maintain a robust creative sector, be forced to recreate much of what it previously enjoyed. We thus conclude that the projected sovereignty gains of Brexit are unlikely to be fully realized, and explore how the efficiency gains of harmonization that flowed from EU membership might be reconstructed in a post-Brexit environment.

By resituating itself in the international regime outside the EU, we do foresee some room for the UK to reconstitute its IP regime and engage in national experimentation. But we also predict an increased importance of transnational private ordering as a means of securing efficiencies; the rise of other harmonisation efforts, which may be no more transparently negotiated or balanced than was the case with measures developed through EU lawmaking institutions; and the development of new forms of political convergence. Some of these arrangements may present opportunities for innovation in knowledge governance, but others raise concerns about increased costs, decreased accountability, and other difficulties. We therefore question whether the transaction costs of the bureaucratic, diplomatic, and private machinations necessary to duplicate EU membership are worth the candle.
About Graeme B. Dinwoodie

Graeme B. Dinwoodie is the Professor of Intellectual Property and Information Technology Law at the University of Oxford, Director of the Oxford Intellectual Property Research Centre, a Professorial Fellow of St. Peter’s College, Oxford, and a University Professor at IIT Chicago-Kent College of Law.

He has previously taught at the National University of Singapore (as the Yong Shook Lin Professor in Intellectual Property Law), New York University University School of Law (as a Global Visiting Professor of Law), the University of Pennsylvania School of Law, and the University of Cincinnati College of Law. Immediately prior to taking up the IP Chair at Oxford, Professor Dinwoodie was for several years a Professor of Law at Chicago-Kent College of Law and, from 2005-2009, also held a Chair in Intellectual Property Law at Queen Mary College, University of London. Professor Dinwoodie holds law degrees from the University of Glasgow, Harvard Law School (where he was a John F. Kennedy Scholar), and Columbia Law School (where he was a Burton Fellow). He is an elected member of the American Law Institute, and served as President of ATRIP from 2011-2013. In 2008, the International Trademark Association awarded Professor Dinwoodie the Pattishall Medal for Teaching Excellence in Trademark Law. In addition to his book A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime (Oxford Univ. Press 2012), co-authored with Professor Rochelle Dreyfuss, he is the author of five casebooks including Trademarks and Unfair Competition: Law and Policy (4th ed 2014) (with Janis), and International Intellectual Property Law and Policy (2d ed. 2008) (with Hennessey, Perlmutter and Austin). Professor Dinwoodie’s numerous articles have appeared in several leading law reviews. He received the 2008 Ladas Memorial Award from the International Trademark Association for his article Confusion Over Use: Contextualism in Trademark Law (with Janis).

About Rochelle Cooper Dreyfuss

Rochelle Cooper Dreyfuss is the Pauline Newman Professor of Law at New York University School of Law and co-Director of its Engelberg Center on Innovation Law and Policy.

Dreyfuss holds B.A. and M.S. degrees in Chemistry. A research chemist before entering Columbia University School of Law, she served as Articles and Book Review Editor of the Law Review. She clerked for U.S. Court of Appeals for the Second Circuit Chief Judge Wilfred Feinberg and for U.S. Supreme Court Chief Justice Warren E. Burger. She is a member of the American Law Institute and was a co-Reporter for its Project on Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. She was a consultant to the Federal Courts Study Committee, to the Presidential Commission on Catastrophic Nuclear Accidents, and to the Federal Trade Commission and served on the Secretary of Health and Human Services’ Advisory Committee on Genetics, Health, and Society. She was also a member of the National Academies Committees on Intellectual Property in Genomic and Protein Research and Innovation, on Intellectual Property Rights in the Knowledge-Based Economy, and on Science, Technology, and Law.
Incrementalism and Intellectual Property Reform in India

Arpan Banerjee, Jindal Global Law School, India

This presentation discusses excerpts from a paper in progress. The paper will examine the merits of following an incremental approach to IP reforms in India, in light of the Indian government’s recent National IP Policy. The paper will consist of four parts. In part I, I will discuss the broader political context in which the Policy was framed. I will refer to Prime Minister Narendra Modi's right-wing economic agenda. I will discuss the Modi government’s aim of improving India’s rankings in various business indices (including IP indices) and rival China as a global manufacturing hub.

In part II, I will examine how global indices ranking IP laws are measured, and why they rank India in a low position. I will share findings of interviews I have conducted with those who design indices like the WIPO Global Innovation Index, the US Chambers of Commerce Global IP Index and the Taylor Wessing IP Index. I will also discuss major grievances that multinational corporations have regarding Indian IP laws, sharing findings of research I am conducting in Germany.

In part III, I will summarise the major recommendations of the National IP Policy. In part IV, I will discuss the extent to which incremental IP reforms in India can help improve India's business environment, compared to deeper reforms requiring changes in substantive laws. Here, I will segregate between patent, trade mark and copyright reform. I will also argue that IP reform cannot be divorced from wider social and economic reforms, some of which are factored in the WIPO Global Innovation Index and weigh India's score down.
About Arpan Banerjee

Arpan Banerjee is an Assistant Professor and Assistant Dean at Jindal Global Law School, India. He is currently on leave, as a recipient of the Alexander von Humboldt Foundation German Chancellor’s Fellowship, and is being hosted by Bucerius Law School in Hamburg. Arpan is researching on the experiences of German companies in enforcing their IP in India, in the context of a broader paper on IP reform in India. He is also delivering lectures at Bucerius. Arpan’s main areas of interest are copyright law, trade mark law and media law. At Jindal, Arpan heads a research centre focused on IP law (CIPTEL). Arpan is also affiliated with the Centre for IP Research at Indiana University Bloomington. Arpan has published widely, and has spoken at numerous international conferences. He has received various awards, grants and fellowships. Arpan’s association with ATRIP began in 2014. After being selected for the 10th WIPO-WTO Teacher’s IP Colloquium, he was selected by WIPO to attend the 2014 ATRIP Congress in Montpellier. Arpan’s paper (on forum shopping) won the third prize at the ATRIP writing competition. The following year, he won the first prize (for a paper on film piracy) and presented at the 2016 ATRIP Congress in Krakow. Prior to joining academia, Arpan practised as an IP lawyer in India, handling both contentious and non-contentious matters.
The paper is a theoretical and practical query of whether innovations in intellectual property rights is changing the dynamics in notions of a development divide between the global south and north. The development divide discussed in this paper seeks to situate innovation in IP networks and in intellectual property as aspects of the new IP order that have added leverage to how emerging economies deal with influential IP counterparts. Innovation is conceptualized and configured differently for the global south than it is for the north. Global changes to approaches in intellectual property systems has led to movements in the state of play between intellectual property rights, development and innovation. In order to remain relevant to the purposes of an intellectual property system, traditional ways of engaging with intellectual property and its eco-system is increasingly changing. To elucidate its arguments, the paper draws on examples from two jurisdictions and uses two developments in the area of geographical indications and trademark rights which have upset the intellectual property landscape in recent years. Many Third World countries have been receptacles for preferential trade agreements containing geographical indication provisions with the global north. This had led to changes in the perception and usefulness of GI amongst several Third World countries. The paper discusses innovative use of geographical indication legislation as a strategic reformist tool in selected jurisdictions including Third World countries, and deals with the conflicts or constraints posed by internationally established trade-marked industries operating in similar fields.

The paper uses the interdisciplinary approach of TWAIL and constructivist reasoning to exemplify its points. Over the years, Third World Approaches to International Law has been a critical intervention in the voice of the un-represented and under-represented in the global operation of international intellectual property law. An interesting turn in TWAIL, is the reformist modalities of the scholarship in creating spaces for a conceptualization of intellectual property rights that is particularized and practiced based on local knowledge, local actors, local resources and accommodative governance structures.

Another complementary point queried in the paper are questions that pertain to how intellectual property rights rules are formed, polices shaped, and the interests and identifies of actors involved in IP rule creation, proliferation and its substantive weight across societies. Constructivist theorize international relations from bases of how actors’ behavior, position and influences are formed, reflected and proliferated amongst and within organization, groups and states. Central languages and themes in constructivism’s
arguments are ‘how’, ‘how possible’, ‘interests’, ‘identity formation’, and ‘interaction’.

The paper also discusses proposals to amend Article 6bis of the Paris Convention to protect the use of country names against commercial and unauthorized uses by third parties, and queries whether its proponents (mainly emerging economies) have upset the dominant status quo of global trademark industries.

About Bassem Awad

Dr. Bassem Awad is Deputy Director for International Intellectual Property and Innovation, International Law Research Program of the Centre for International Governance Innovation (CIGI) in Canada. He is Head Tutor of several Distance Learning Courses and Professor at the Master’s Degrees organized by the World Intellectual Property Organization (WIPO) Academy. Professor Awad is also an Instructor at the Institute for Training and Technical Co-operation, World Trade Organization.

Bassem served for several years as a judge and head of the IP tribunal at the Appeal Court in Egypt and the United Arab Emirates as well as an Adjunct Professor at the faculty of Law at the University of Western Ontario. His current research at CIGI focuses on the role of intellectual property rights in addressing the global challenge of climate change and sustainable development as well as the management of IP rights.

Prof. Awad received his Ph.D. and LL.M degrees in Intellectual Property from the University of Montpellier, and an LL.M in International Business Law from University of Sorbonne. His experience includes working in both common and civil law systems and conducting a number of research projects for international and regional organizations. He is a member of the Editorial International Committee of Revue “Cahiers de Propriété Intellectuelle”.

Bassem research interests include Patent Law; Copyright Law; Comparative Intellectual Property and Governance of Intellectual Property.

About Marsha Simone Cadogan

Marsha Simone Cadogan is a post-doctoral fellow with the Centre for International Governance Innovation (CIGI) International Law Research Program (ILRP). Her research at CIGI is focused on the interrelationship between geographical indications (GIs) and trademark laws, as well as the global implications of GIs in preferential free trade agreements.

Dr. Cadogan’s broader research interests are in IP rights and international trade, IP rights and innovation, and international law and development in a global context. Her expertise is multijurisdictional and includes the IP jurisdictions of the European Union, the United States, Switzerland, Japan, Canada and the Caribbean.

She has a bachelor of science, economics and management from the University of the West Indies (Jamaica), an LL.B. from the University of London (England) and an LLM and a PhD in intellectual property rights law from Osgoode Hall Law School, York University. She is a member of the board to Canada’s International Law Association, and is a Barrister and Solicitor in Ontario, Canada.
Human Rights, Intellectual Property Disputes, and International Investment Agreements

Emmanuel Kolawole Oke, Edinburgh Law School, University of Edinburgh, UK

The incorporation of intellectual property into investment treaties as investment assets is now being scrutinized by scholars in the field of intellectual property law and there are concerns about the potential impact that this incorporation can have on the powers of states to adopt regulatory measures in the field of intellectual property law that are designed to address local circumstances. These concerns have recently been brought to the forefront with the investor-state arbitration cases brought by Philip Morris against Australia and Uruguay in relation to the introduction by both countries of measures to control the consumption of tobacco products in their respective countries. In addition, Eli Lilly recently challenged the invalidation of its patents by Canadian courts for failure to satisfy Canada's utility requirement before an investment tribunal.

In a recent paper, Susy Frankel has highlighted the differences between the objects and purposes of international intellectual property law on the one hand and the objects and purposes of investment agreements. Frankel further discusses how the Vienna Convention on the Law of Treaties should be used as a basis for construing the objects and purposes of intellectual property as an investment asset.

This paper seeks to build on Frankel's arguments by suggesting that international human rights law also has a role to play in construing the objects and purposes of intellectual property as an investment asset. Pertinently, some of the intellectual property measures being challenged by corporate actors via the investor-state dispute settlement system have an
impact on human rights. For instance, the measures introduced by the Uruguayan government to reduce the consumption of tobacco products promotes the enjoyment of the right to health of Uruguayans.

Against this backdrop, using the decision of the arbitration panel in the dispute between Philip Morris and Uruguay as a case study, this paper will examine the role of human rights in the resolution of intellectual property disputes in the context of the investor-state dispute settlement system. Crucially, both intellectual property and human rights law equally recognize that intellectual property rights have a social function. The paper will therefore investigate the extent to which the incorporation of a human rights perspective into investor-state disputes concerning intellectual property can help to achieve the objectives and purposes of intellectual property in the context of international investment agreements.

**About Emmanuel Kolawole Oke**

Emmanuel is a Lecturer in International Intellectual Property Law at Edinburgh Law School, University of Edinburgh. He has LLB and LLM degrees from the University of Lagos. He also has an LLM degree in Intellectual Property and Technology Law from the National University of Singapore. He obtained his PhD degree from University College Cork, Ireland.

His teaching and research focuses on international and comparative aspects of intellectual property law, and an examination of the relationship between intellectual property and human rights. He is also interested in analysing intellectual property rights in the context of business and human rights.

Since the 1980s rights holders have pressed for stronger intellectual property protection as an end in itself. The public policy rationale for such rights has been marginalised in political battles. I identify what is at stake and suggest some ways to reclaim intellectual property as a means to achieving broad social purposes and re-dressing the current imbalance in intellectual property governance.

About Susan Sell

Susan Sell is Professor Emeritus of Political Science and International Affairs at George Washington University, and Professor, School of Regulation and Global Governance (RegNet) in the College of Asia and the Pacific, Australian National University. Her areas of expertise include, international political economy, intellectual property, trade, development and global governance. She is author of: Private Power, Public Law: The Globalization of Intellectual Property Rights (Cambridge University Press, 2003); Power and Ideas: North-South Politics of Intellectual Property and Antitrust (SUNY Press, 1997); co-author of Intellectual Property Rights: A Critical History (Lynne Rienner, 2005); and co-editor of Who Governs the Globe? (Cambridge University Press, 2010). She serves on the board of Geneva-based IP-Watch and served on the expert advisory committee for the UN Secretary General's High-Level Panel on Access to Medicines in 2016.
Session 2

What is Copyright For?

GBLT1
Session 2 Chair
*Ruth Okediji, Harvard Law School, USA*

Ruth Okediji is the Jeremiah Smith, Jr. Professor of Law at Harvard Law School and co-Director of the Berkman Klein Center. She previously taught at the University of Minnesota Law School where she held the William L. Prosser Professorship and a McKnight Endowed Presidential Professorship. Professor Okediji writes on global knowledge governance and international aspects of IP protection, with a focus on how harmonized copyright and patent law norms affect economic development in emerging economies. Her work has been influential in global debates about IP reform, and in guiding national strategies for pro-competitive and pro-development implementation of multilateral and regional IP treaties in countries throughout Africa, the Caribbean, and the Americas. She has published widely in academic journals and is the author of numerous commissioned studies for intergovernmental, regional and non-governmental organizations. Her most recent books are *The World Blind Union Guide to the Marrakesh Treaty* (with Laurence Helfer, Molly Land and Jerome Reichman, Oxford University Press, 2017), and *Copyright Law in An Age of Limitations and Exceptions* (Cambridge University Press, 2017).

Okediji has received numerous teaching awards and honors for her scholarly work. She was elected to the American Law Institute (ALI) in 2008, and has served as President of the Order of the Coif since 2016.
Intellectual Property as Seen by Barbie and Mickey: The Reciprocal Relationship of Copyright and Trademark Law

Jane Ginsburg, Columbia Law School, New York, USA

Copyright and trademarks often overlap, particularly in visual characters. The same figure may qualify as a pictorial, graphic or sculptural work on the one hand, and as a registered (or at least used) trademark on the other. The two rights often tend to be licensed, and litigated, together. As a result, doctrines developed for one kind of IP right may influence the other, most notably fair use. I will first address how the US copyright fair use doctrine has led to similar analyses in cases of trademark parodies. Second, I will consider the conflict between trademark law’s potentially eternal duration and copyright’s constitutionally mandated limited times, particularly in the context of visual characters such as Mickey Mouse. Finally, as further evidence of copyright/trademark reciprocity, I will evoke a newer trend, the refashioning of trademark symbols into copyrighted characters.
About Jane Ginsburg

Jane C. Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University School of Law, and Faculty Director of its Kernochan Center for Law, Media and the Arts. She teaches Legal Methods, Copyright Law, International Copyright Law, and Trademarks Law, and is the author or co-author of casebooks in all four subjects, as well as of many articles and book chapters on domestic and international copyright and trademark law. A graduate of the University of Chicago (BA 1976, MA 1977), Professor Ginsburg received a JD in 1980 from Harvard, where she was an editor of the Law Review, and a Diplôme d'études approfondies in 1985 and a Doctorate of Law in 1995 from the University of Paris II. She is a Corresponding Fellow of the British Academy, a Member of the American Philosophical Society, a Member of the American Academy of Arts and Sciences, and an Honorary Fellow of Emmanuel College, University of Cambridge.
How International Copyright Assisted American Corporate Capitalism and Led to the Decline of the Australian Feature Film Industry

Kathy Bowrey, Faculty of Law, University of New South Wales, Australia

In 1911 fifty-two narrative films were produced in Australia. It was described as a time of keen competition in the films.

The following year, coincidentally, around the same time that the Copyright Act 1911 (UK) came into force, an Australian film combine, Amalgamated Pictures/Australasian Films emerged. In 1925 the Motion Picture Distributors Association of Australia (MPDAA) was established, constituted by the local branch offices of the large American film studios and the Australian combine. In 1927 a Royal Commission into the Motion Picture Industry (1927) was established to investigate whether a practice of blind and block booking had killed local film production and had a stranglehold on exhibition. A key finding of the Commission was that 90% of films screened in Australia came from the US, with 60% of profits returning entirely untaxed.

This paper explores how US control was achieved through leverage of copyrights (despite the US’s failure to sign the Berne Convention), and through other financial mechanisms, and why despite ongoing public outcry, Australian lawyers and politicians accepted these unjust arrangements. I also reflect on how the emergence of international copyright, supported by commercial infrastructure, affected creators and impacted upon the possibilities of an Australian cinema.
About Kathy Bowrey

Dr Kathy Bowrey is Professor in the Faculty of Law at the University of New South Wales, Sydney Australia whose expertise relates to intellectual property, information technology regulation, regulatory theory, media practice, business history, feminist scholarship and a concern for Indigenous rights. Her research is marked by an interdisciplinary and historical approach, with a focus on convergences between disciplines, tracing the epistemological, organisational and regulatory frameworks that support:

- Technology and innovation, including digital technology, data security, privacy and ethics;
- Cultural production, including advertising and marketing, mainstream, avant garde and amateur creation;
- Indigenous rights advocacy, especially cultural heritage and traditional knowledge.


Kathy is a Foundation member of the International Society of the History and Theory of Intellectual Property (INSHTIP) and a member of the UNSW Law Private Law Research Cluster and the Law Technology Innovation Research Network.
The article is a ‘follow up’ on a previous article where a model for a restructuring of the economic rights in copyright was sketched out (see Ole-Andreas Rognstad, Restructuring the Economic Rights in Copyright – Some Reflections on an Alternative Model, 62 J Cop. Soc. USA (2015) 503).

The model is based on a ‘one stage structure’ where the right holder has a right to a ‘reasonable exploitation of a work’, instead of the current ‘six stage structure’ (exploitation rights, exceptions to the exploitations rights, secondary liability, safe harbors, protection of technical protection measures (TPMs), exceptions to the protection of TPMS).

In the current article, the concept of ‘reasonable exploitation’ is sought concretized on the basis of the presumption that ‘the utilitarian goal of social welfare maximization is a key element in justifying modern copyright rules’. Thus, the content of reasonable exploitation is ‘filtered through’ the utilitarian goal of social welfare maximization (efficiency). While hard core economists would hold that in theory, the welfare economic framework could include any other norms than equity (or fairness) through their welfare effects, we take in the article a more pragmatic approach by opening up room for other social or legal norms than efficiency to give reason to amend the normative economic stance.

Proportionality, public domain, dignity, freedom of expression and market integration are identified as such norms which may give rise to adjust the outcome of a welfare economic analysis of copyright issues to the extent that it does not monetize these norms.

This approach to reasonable exploitation is subsequently applied to a number of prominent present day copyright issues: private copying, redistribution of purchased material, downloading from illegal sources, data mining, access controls and protection of TPMS, intermediaries’ liability, and linking and embedding.

Across this diverse set of cases studies, it is shown to lead to consistent and converging outcomes. However, these outcomes are also shown to differ in a number of respects from the formalistic approach followed by the Court of Justice of the European Union (CJEU). In line with the previously suggested alternative model for restructuring the economic rights in copyright we propose that a catalogue style of regulation is the optimal way of balancing predictability and flexibility under the right to a reasonable exploitation.
The article is co-authored with Dr. Joost Poort at the University of Amsterdam and is written within the framework of the project ‘Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change’ headed by Prof. Bernt Hugenholtz and funded by Microsoft. It will appear in the book containing all contributions to the project, which will be published by Kluwer and come out during the autumn 2017.

About Ole-Andreas Rognstad

Ole-Andreas Rognstad is full professor at, and former director of, the Department of Private Law, University of Oslo. He teaches a whole range of subjects, including legal methodology and EU/EEA law and intellectual property law, in particular copyright law. His authorship includes a textbook on (Norwegian) copyright law and contributions to a (co-authored) textbook on EEA law as well as a large number of articles in the field of intellectual property, the most recent including ‘Restructuring of the Economic Rights in Copyright – Some Reflections of an Alternative Model’ (J. Cop. Soc. USA 2015, 503) and ‘Linking – A Gordian Knot of Copyright Law’ (in Liber Amicorum Jan Rosén, 2016).

He is a member of the editorial boards of the journals Nordiskt Immateriellt Rättskydd (Nordic Journal of IP Law) and Scandinavian Studies of Law. He has chaired, and been a member of, a number of public dispute settlement resolution bodies in Norway and is a member of the Academia Europea.
New Neighbouring Rights for Digital Press Publishing

Valentina Moscon, Max Planck Institute for Innovation and Competition, Germany

In the fast-changing area of new media, the online publishing sector has raised concerns about the risk of being taken over by third parties that would deprive publishers of market compensation for their production activities (in particular, by displaying hyperlinked headlines to news stories with extracts of text). In Europe some press publishers claim that new online market players would benefit from the publishers’ works, without sharing the value generated from them.

On 14 September 2016 the European Commission (hereafter EC) published a Proposal for a Directive on “copyright in the digital single market” which provides for the introduction of neighbouring rights for press publishers (hereafter NRPPs). With the aim of responding to competition and publishers’ “productivity” concerns, allowing publishers to receive remuneration for other media companies’ use of their products, the envisaged NRPPs include new exclusive rights of reproduction and making works available to the public online for a period of 20 years after publication. This proposal comes in the wake of a general trend to create new “neighbouring rights”, as is the case, for instance, in sports events: certain EU Member States including Italy have introduced special sports organisers’ rights in their domestic laws.

However, the way in which such legal instruments are used reveals that the underlying basic concepts are rather vague. In light of this not very gratifying result, we need to reflect on the legal and economic foundation of neighbouring rights and their relationship with copyright law. This enquiry is the basis for assessing the suitability of the legal instrument proposed by the EC to protect press publishers in the online communication market.

This paper proposes to analyse these aspects, on the one hand highlighting the lack of a rationale for introducing NRPPs, and on the other showing that tangential territories of law such as competition law might be relevant in this field.
About Valentina Moscon

Valentina Moscon is Senior Research Fellow at the Max Planck Institute for Innovation and Competition in Munich, Germany. She received her Ph.D. in Comparative Private Law from the University of Trento, Italy (2009) where she worked as postdoctoral research fellow in Comparative Private Law with appointments in copyright law, contract law, and tort law. From 2007 to 2016 she worked as a freelance lawyer in Italy. Her awards include “Premio Nazionale Vittorio Frosini”, a national Prize for PhD Theses in IT Law. In 2008, with a grant awarded by the Trento Faculty of Law, she was visiting scholar at the Institute for Information Law in Amsterdam carrying out research on copyright law, contract law, and digital rights management. Between 2011 and 2015 she was visiting fellow at the Institute for European and Comparative Law at the University of Oxford.

Her research currently focuses mostly on European and comparative copyright law. In the last year she has worked among others on the Position Statement on the Modernisation of the EU Copyright Rules, which is going to be published as an e-Book by the Max Planck Institute. She has authored several publications and has been invited to give numerous talks. She also currently teaches a class in “Copyright Law and Art” at the University of Trento. Valentina is a founder of the Italian association AISA (http://aisa.sp.unipi.it/about-aisa/), a non-profit organization whose mission is to advance open access to knowledge.
The recently proposed EU Directive on Copyright in the Digital Single Market includes two fundamental limitations: one for the text and data mining carried out in research organizations (art.3), and one for the use of works for teaching purposes in digital and cross-border activities (art.4). Both limitations are mandatory, in the sense that they must be applied by all Member States and with the harmonized scope provided for in the Directive. For that, the proposal must be praised, becoming an important first step towards overcoming the fragmentation of limitations within the EU. However, both limitations will fail to secure the protection of the underlying public interests (research and teaching) because they are both ultimately subject to licensing and the will of copyright owners. The limitation for TDM will only apply if the research organization has “lawful access” to the contents to be mined; while Member States are allowed to disregard the limitation for teaching purposes when “adequate licenses authorising the teaching uses are easily available in the market”.

In the first case, the limitation is restricted only to the databases that have been licensed (can be afforded) by the institution. Furthermore, copyright owners will include TDM use in their licensing price – thus, turning the TDM limitation into a “free pass” for copyright owners to set a higher price for their subscription fees. In the second case, the limitation may be trumped with licenses. This will not only result in legal uncertainty in teaching scenarios but also fail to secure the very public interest that justifies this limitation. Copyright owners might offer licenses for teaching uses in terms (i.e., excessive pricing or unfair licensing terms) that are impossible to accept by teaching institutions; Even where no adequate licensing is available, risk-avoiding institutions will hardly benefit from the limitation due to the legal uncertainty it creates.

The tendency to subject limitations to private ordering is nothing new in EU copyright – see limitations yielding to the protection of DRM and TPM and the poor balance achieved by Art.6(4) InfoSoc Directive; but it should not become a usual approach.
The proper balance between copyright and public interest (here, teaching and research purposes) can only be secured by means of mandatory exceptions which are binding for the copyright owner and “safe” from the exercise of any exclusive rights. Teaching and research (TDM) uses should be directly authorized (secured) by the Copyright statute, allowing no interference of private ordering / licensing and securing -when necessary- equitable compensation in order to comply with the three-step-test.

About Raquel Xalabarder

Session 3A

The Expanding Nature of Trade Marks and Geographical Indications

GBLT1
Session 3A Chair

Christophe Geiger, Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg, France

Christophe Geiger is Professor of Law, Director General and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg (France). In addition, he is an affiliated senior researcher at the Max Planck Institute for Innovation and Competition in Munich (Germany), as well as Spangenberg Fellow at the Spangenberg Center for Law, Technology & the Arts, Case Western Reserve University School of Law in Cleveland (US).

He specializes in national, European, international and comparative intellectual property (IP) law, acts as external expert for the European Parliament and the European Union Intellectual Property Office (EUIPO), has drafted reports on IP for the European and international institutions and taught as visiting professor in several universities, his latest appointment being Global Hauser Visiting Professor at the New York University (NYU) School of Law in spring 2017. He is also General Editor of the Collection of the CEIPI published by LexisNexis, co-editor of the EIPIN series published by Edward Elgar, co-editor of the CEIPI-ICTSD Publication Series on “Global Perspectives and Challenges for the Intellectual Property System” and member of the editorial board of several journals on IP law.

Online Trading, Internet Advertising and Mark Infringement: Trends of Consumer Protection by African Courts

Joelle Nwabueze, Enugu State University of Science and Technology, Nigeria

Internet and ICTs have become powerful tools for presenting and promoting products and services to customers. With the expansion of electronic commerce, trade advertising has broken the traditional geographical/time boundaries. Today, internet delivers advertisements to online users via internet websites, e-mails, smart phones, etc. Merchants make use of e-mail marketing, social networks, contextual ads on search engine results pages, etc. to advertise various products and services. The internet replaces in this sense the traditional mediums such as magazine, and TV spots, often used for promoting products. With the evolution of trade and preferences in the market place, online business becomes a battlefield with intense competition of a multitude of advertisers reaching out to consumers, and trying to meet up diverse expectations of taste, color, and fitness, in an evolving world. As competition grows in this seduction dance with consumers, so do the standards of integrity decrease. Brands promoters’ online seduction sometimes involves deceptive practices susceptible to constitute mark infringement. The trademark law plays in this sense an important role by setting the standards of mark distinctiveness, and ensuring as well marks protection from eventual infringement by competitors. The question arises to what extent does the law of trademark enhance consumer protection against mark infringement in the course of internet advertising in Africa? This paper firstly analyses the concept of internet advertising and mark infringement issues pertaining thereto with a particular attention to the African Organisation of Intellectual Property (OAPI), the African Regional Intellectual Property Organisation (ARIPO) and South African intellectual property communities. The paper goes further to discuss the legal framework regulating internet advertising and mark protection in those regions. Consumers’ security and protection vis-à-vis products quality constitute the cornerstone of trademark law. To what extent then African Courts enforce consumers’ security once misleading occurs during deceiving internet advertising? The paper critically X-rays judicial intervention in Africa in securing equity in online advertising and promoting of products and
services. The paper ends with a comparative analysis with foreign jurisdictions, and recommendations in the light of international trademark law.

**About Joelle Nwabueze**

Caroline Joelle Nwabueze is Senior Lecturer in Law at Enugu State University of Science and Technology in Nigeria, currently research Fellow under the South African Research Chair in Law, Society and Technology, University of South Africa. She teaches the laws of intellectual property, at both undergraduate and postgraduate levels. She is a graduate from WIPO LLM Intellectual Property course, University of Turin, Italy, Handong International Law School in Korea, Nantes University in France and University of Douala, Cameroon. She is passionate on law and development and has completed several research papers on Intellectual property and economic growth in Africa, using her dual background in common law and civil law system prevailing in the African Intellectual Property Legal System. She successively served as legal intern at the World Intellectual Property Organisation in Geneva, and intellectual property consultant in UNESCO ICHCAP Korea. She is currently preparing her doctorate in intellectual property law at Bern University, Switzerland.
Human Rights and the Object and Purpose of International Trade Mark Agreements

Genevieve Wilkinson, University of Technology, Sydney, Australia

This paper will consider the object and purpose of key international treaties regulating trade mark law from a human rights perspective. It argues that trade mark law engages a number of important human rights issues and a human rights approach is relevant to an analysis of the object and purpose of TRIPS and the Paris Convention. This paper will consider the way in which different interpretations of the object and purpose of TRIPS permit or exclude a human rights perspective. It will contrast the object and purpose of TRIP to an interpretation of the object and purpose of the Paris Convention.

The intersection between intellectual property and human rights has frequently been considered in the context of patents and copyright following the introduction of TRIPS. For example, human rights concerns were used persuasively to address concerns about the impact of the patent provisions of TRIPS on access to medicine and remain relevant to that debate as well as others such as the protection of traditional knowledge for Indigenous Peoples. Recently human rights arguments focusing on the impact of more expansive protection of copyright featured in debate surrounding the ratification of ACTA in a number of countries. Concerns about the human right to education remain relevant to the protection of copyright in educational materials.

The potential role of human rights in the context of trade marks has become increasingly apparent. Disputes regarding tobacco plain packaging provide a valuable case study to consider the relationship, engaging questions about human rights to health, freedom of expression, development and protection of moral and material interests in intellectual property itself. The important public health arguments raised by the WTO plain packaging disputes can be viewed from the perspective of the
human right to the highest attainable standard of health. Despite this, a human rights perspective has not been the emphasis of the arguments made by Australia. This paper will argue that an emphasis on both human rights and the object and purpose expressed in the preamble and articles 7 and 8 of TRIPS in legislative material surrounding Australia’s tobacco plain packaging legislation would have been complementary and could have been beneficial to Australia in protecting that legislation from the WTO disputes and investor-state arbitration.

**About Genevieve Wilkinson**

Genevieve Wilkinson is a Quentin Bryce Doctoral Scholar and Teaching Fellow currently undertaking doctoral research considering the intersection between human rights and intellectual property in Australian trade mark law at University of Technology Sydney. She is also a barrister with a practice in intellectual property law. Genevieve lectures at University of Technology Sydney in the fields of Australian intellectual property law and policy, designs law and practice, international intellectual property law and in subjects taught as part of the Bachelor of Creative Intelligence and Innovation. She also lectures in human rights law at Australian Catholic University.
How 3D Printing Challenges the Consumer Protection Rationale of Trademarks

Bram Van Wiele, Intellectual Property Unit, University of Cape Town, South Africa

Over the years, trademarks have attained value in and of themselves, divorced from any underlying good. Consumer 3D printing accentuates this trend by enabling the application of trademarks on a wide range of privately, decentralised manufactured products. Through the facilitation of decentralised manufacturing, 3D printing will not only further diminish the waning connection between the trademark owner and the trademarked goods, but will challenge the reasonable belief that the trademark owner has, to some extent, control over the quality of his products. Consumer expectations of trademarks will change accordingly. As trademarks are less and less able to fulfil their traditional functions as indicators of source and quality, the technology ultimately challenges the consumer protection rationale of trademarks.

Taking the various models of digital design dissemination into consideration, this article explores the potential consequences of 3D printing for the rationale behind the current trademark system and the projected change in consumers’ expectations of trademarks.
About Bram Van Wiele

Bram Van Wiele is a PhD candidate at the University of Cape Town (UCT) Department of Commercial Law. His research focuses on the intellectual property implications of consumer 3D printing considering promoting creativity, collaborative innovation and development in South Africa. Van Wiele obtained his LLB and LLM degrees from the University of Antwerp (Belgium) where he majored in International and European Law. In 2014, he obtained an additional LLM, specialising in intellectual property law, from UCT. During these studies, Van Wiele was awarded the David Potts Essay Prize for his essay on cyber libel. He joined the UCT Intellectual Property Unit in March 2014 and organises the Unit’s CopyrightX:UCT course.
‘To Kill a Trade Mark’ Wartime Lessons on the Objects and Purposes of Trade Mark Law

Catherine Bond, Faculty of Law, University of New South Wales, Australia

During the early months of World War I, a number of jurisdictions, including the United Kingdom and Australia, introduced legislation for dealing with enemy-owned intellectual property rights for the duration of that global conflict. In Australia, the Federal Government, led by Attorney-General William Hughes, enacted a regime for the ‘avoidance’ or ‘suspension’ of intellectual property registered to enemies of that country. Although patents and inventions received most of the initial parliamentary, industry and community interest, hundreds of trade marks were suspended under this system, raising points of controversy as to not only the objects of that law, but trade mark law more generally. Indeed, when the legal, parliamentary, social and practical consequences of this regime are examined in more detail, it is evident that issues affecting how we think about the objects and purposes of trade mark law, at both national and international levels, can be usefully informed by this experience.

This paper focuses on three elements of this wartime experience that, while perhaps not originally considered to be part of the object and purpose of trade mark law, have generated debate and influenced development of this area in recent times: the relationship between trade marks and public health; the role of trade mark law in innovation; and consumer attachment to trade marks.

It begins by briefly examining trade mark law in Australia to 1914 and the introduction of the Patents, Trade Marks and Designs Act 1914 (Cth), which created this wartime regime, and provides a brief overview of the many trade marks captured by this law during the war. It then considers each of these elements in detail by focusing on two trade marks that received the most applications and attention during this period: Aspirin and Lysol. Both products were the subject of significant shortages in Australia and internationally and, as a result, the Attorney-General would only suspend these trade marks in favour of individuals or businesses with the capacity to create the exact product. On that basis, trade mark law was used to meet public health and innovation concerns. However, as the war progressed, it was increasingly recognised that allowing traders to use the Aspirin and Lysol trade marks in fact provided a benefit to the enemy – but consumers
were so devoted to these particular brands that it was impossible to, for example, 'kill' the Aspirin trade mark.

The paper concludes by reflecting on how these wartime experiences may be used to inform our understanding of public health and innovation in trade mark law today, and the place of both in the objects and purposes of trade mark law more generally. It also examines consumer devotion, and the role that these can play in shaping trade mark law in the future.

About Catherine Bond

Dr Catherine Bond is a Senior Lecturer in the Faculty of Law, UNSW Sydney, Australia. She completed her PhD in Law at UNSW and became an academic member of the faculty in July 2009. Catherine teaches undergraduate and postgraduate intellectual property courses and her research focuses primarily on historical intellectual property issues. She has published widely in leading Australian and international law journals, on topics ranging from Crown copyright, to plain packaging of tobacco products, to the introduction of a patent system in the *Game of Thrones* world of Westeros. Catherine’s first book, *Anzac: The Landing, The Legend, The Law*, which explores the hundred-year history of the regulation of the word ‘Anzac’ in Australia and internationally, was published by Australian Scholarly Publishing in 2016. With Professor Kathy Bowrey, Catherine also holds an Australian Research Council Discovery grant for a project entitled, ‘Australian Made: A History of Australian Copyright Law and Creator Success 1868-1968’.
A Toast to Geographical Indications: The Market Battle of Champagne and Prosecco

Henry Biggs, Washington University, St Louis, USA

The primary purpose of Geographical Indications (GIs) is to avoid consumer confusion with respect to geographic source. Critics of GIs contend that GIs constitute an overprotection and may permit inappropriate market distortions; other critics view them more as superfluous, contending that Certification and Collective Marks under Trademark regimes more appropriately protect consumers from confusion. The different approaches of the Lisbon Agreement, the TRIPS treaty and the Lanham Act all address the challenges of GIs slightly differently and in so doing speak to the difficulty of fully harmonizing GI perspectives.

An analysis of the interplay of the GIs Champagne and Prosecco proves instructive in this regard. Champagne’s relatively high pricing would seem to have contributed to the rise of Prosecco in the world market. This is suggested in part by Champagne’s decrease in sales volume by .4 percent over the last few years while Prosecco sales have jumped by 78 percent. This presentation will seek to document closely the market interplay of these GI heavyweights, considering whether the criticisms
of how GIs function – or fail to— in the IP landscape are warranted and addressing ultimately whether GI protections do indeed lead to appropriate market outcomes.

About Henry Biggs

Henry Biggs currently serves as Adjunct Professor of Intellectual Property and Computational Linguistics at Washington University in St Louis. He earned his BA from Harvard in Classics-Latin, then his Phd in Romance Linguistics at UCLA, focusing on statistical anomalies of the French poets of the Renaissance period. He later served as French Professor, then Chair of Foreign Languages at Houghton College, before serving as Assistant then Associate Dean of the College of Arts & Sciences at Washington University in St Louis.

While at Washington University and serving as Dean, Biggs earned a JD, LLM in Intellectual Property and French Master 2 in European and International Law and began teaching International Intellectual Property at Washington University in St Louis. He is also deeply committed to the issues that face St Louis in this very difficult time.
Session 3B
Object and Purpose in the Digital Realm
GBLT2
Session 3B Chair

Susan Corbett, School of Accounting and Commercial Law, Victoria University

Susan Corbett is Associate Professor of Commercial Law in the Business School at Victoria University of Wellington, where she teaches e-commerce law, contract law, and intellectual property law and business innovation. She has been a practising solicitor (UK), is admitted as a barrister and solicitor (New Zealand) and is currently the President of the Asian Pacific Copyright Association. Her research focuses on the interface of intellectual property law with the broader community. Past projects include providing intellectual property case studies for high school technology students, critiquing the legal environment for preserving New Zealand’s earliest digital heritage, and examining the impact of copyright law on the digitisation practices of cultural heritage institutions. Her current projects include analyses of New Zealand copyright law with a view to revisions relevant to digital archiving and orphan works, commercial licensing of intellectual property, and the legal status of country code domain names and their regulation.
The growth of emerging technologies such as 3D printing impacts on intellectual property (IP) law, leading to a number of implications including copyright, design and licensing issues. Such challenges question the enforcement, object and purpose of IP laws whilst exploring the opportunities presented through the licensing mechanism.

Building on the Commissioned Research carried out for the UK Intellectual Property Office (UKIPO) in 2015 and based on the funded project, ‘Going for Gold’ this paper explores the copyright, design and licensing issues surrounding 3D scanning, 3D printing and mass customisation of ancient and modern jewellery. The IP implications of 3D scanning and 3D printing museum artefacts, particularly jewellery, remain unexplored. 3D scanning leading to 3D printing throws up licensing and copyright issues. At present there is very limited work in this area and a lack of understanding of the various IP issues. 3D scanning allows for ‘reviving’ and accessing our cultural heritage through collaboration with museums and cultural institutions. However, with limited understanding surrounding copyright and licensing issues, this potential is yet to be unlocked.

Working with various museums, this paper will set out Practice Guidelines presented through the research carried out with cultural organisations outlining the state-of-the-art and common practices in relation to the copyright, design, licensing and contractual issues of 3D digital archives generated during digitisation projects.

The IP implications relating to modern jewellery, in the context of 3D printing technologies are highlighted particularly through mass customisation. Traditional Mass Production is highly profitable but provides limited flexibility for customising individual objects. 3D printing enables mass customisation, where consumers are presented with an ‘incomplete product’ which they can customise before it is completed.

Furthermore, the next 3-5 years will see a proliferation of scanning capabilities leading to real-time photogrammetric and cloud-based data processing to eclipse more traditional laser scanning solutions. Whilst such developments will have an effect on design, it will equally have the potential to infringe IP laws using the capabilities of mobile devices to
access cloud services. To respond to these issues, the project will explore the copyright, design and societal questions, thrown up by mass customisation and will also highlight its main advantages and disadvantages. Whilst such developments will have an effect on design, it raises questions on enforceability as well as the object and purpose of IP law, which this paper will outline amongst other recommendations made through the research.

**About Dinusha Mendis**

Dinusha Mendis is Professor of Intellectual Property Law and Co-Director of the Centre for Intellectual Property Policy and Management (CIPPM).

Dinusha specialises in Intellectual Property Law, in particular copyright law, copyright licensing and digital copyright policy and has published widely in this area. Her research also includes exploring the challenges to intellectual property law as a result of emerging technologies and in this context, she has conducted extensive funded and independent research on the intellectual property implications of 3D printing and emerging technologies.

She has been invited to speak on the topic at the European Parliament; Office for Harmonization in the Internal Market (OHIM); UK House of Lords and at various academic organisations and for blue-chip industry clients.

During 2015, Dinusha was on research leave and held appointments as a Visiting Scholar at the University of Tasmania Australia and Stanford Law School, University of Stanford California.

Dinusha holds qualifications from the Universities of Aberdeen (LLB (Hons)); Edinburgh (LLM, PhD); Nottingham Trent University (BVC) and has been Called to the Bar of England and Wales and is a member of the Honourable Society of the Middle Temple Inn, London.
Legislative Measures Related to Online IPR Infringements: Keeping Up with IPRs Role and Purpose

Ana Nordberg, Faculty of Law, University of Copenhagen, Denmark
(co-author) Knud Wallberg, Faculty of Law, University of Copenhagen, Denmark

The rational of IPRs emerged from two logics of justifying legal protection for intellectual creations or immaterial goods: 1) IP as a manifestation of personality and an exterior extension of personality and thus inherently of personality rights; and 2) IP as an useful creation of human endeavour, an economic asset capable of being considered an immaterial form of property. Both the personality and the utilitarian justifications of IPRs were developed by reference to the material world. The digital ecosystem is a dematerialized space. A space where traditional market barriers and translation costs, by default either do not exist or are severely reduced. Simultaneously, the internet has become more than a tool for work and leisure. It is now, at least for the younger generations, a primary space of socialization and an important commercial, business, cultural and educational forum.

IP Law enforcement has faced constrains and difficulties. Online infringement are enforced mostly under the general procedural rules concerning jurisdiction and evidence applicable to all infringements. There is an inherent tension in applying the same procedures and normative frameworks to a global digital world. Online IPR infringement raises difficult challenges, especially in regards to territoriality, jurisdiction and other trans-border issues. Moreover, online infringements are often of a dematerialized nature and difficult to subsume to rules creates for general types of infringement.

Legislators have been aware for some time of the difficulties posed by the digital world and steps were taken towards adapting and applying enforcement of IPRs to the new digital realities. A number of legislative measures have been adopted specifically to facilitate online enforcement of rights. Not always specifically targeting IPRs, but also encompassing enforcement of IPRs. At EU level examples are the IP Enforcement Directive, the Regulation on customs enforcement of IPRs, and the Electronic Commerce Directive. There are no specific EU harmonization on administrative or criminal enforcement of IPRs. However, the European Arrest Warrant, the European Evidence Warrant (and the European Investigation Order, under implementation) as well as money laundering legislation can also to some extent
be tools for IPRs enforcement. Moreover, at the international level the TRIPS Agreement provides an international basis for enforcement of IPRs, and the council of Europe Cybercrime Convention has created a number of tools with relevance to the enforcement of IPRs.

In this paper, we will present some of our preliminary findings from a study conducted on legislative measures related to online IPR infringements by the Authors for the EUIPO on legislative measures related to online IPR infringements. We will begin by mapping the existing legislative national measures and implementation of EU and international legislation in EU countries directed at tackling online infringement. Followed by a discussion on challenges of IPRs enforcement, and how to preserve the function and justification of IPRs in a manner compatible with the need of emerging technologies, new business models and with the evolution of cultural attitudes towards IPRs and its enforcement.

About Ana Nordberg

Ana Nordberg, PhD, LLM is Assistant Professor in Health and Innovation Law, at the Centre for Information and Innovation Law (CIIR), Faculty of Law, University of Copenhagen. She is a former practicing lawyer and a researcher at CIIR since 2010, where she defended her recently published Ph.D. Thesis - Patenting Nanomedicine in Europe: Applying the ‘medical exception’ to Emerging Technologies (DJØF, 2017).

Dr. Nordberg has a strong interest in science and technology, particularly, but not restricted to the biotechnology, pharmaceutical and health-wellness sectors. Her research addresses legal issues surrounding emerging technologies with particular emphasis in Patent law. Inter-, cross- and intra-disciplinarity is a main component of this research, which also involves a broader spectrum of legal topics, subjects and perspectives, such as other intellectual property rights and the interface between them, open innovation, competition law, health law, regulatory issues, EU and international law, comparative law, legal theory and methodology issues.

Current main research interests concern: Digitalization in health, Big Data, Block chain Technology, Gene editing, 3D printing, Synthetic Biology and Nanotechnology.

Full biography and publication list available at: http://jura.ku.dk/ciir/english/staff/?pure=en/persons/401391
3D Printing and Intellectual Property Futures

Angela Daly, Faculty of Law, Queensland University of Technology, Australia

This presentation will demonstrate the work undertaken so far for United Kingdom Intellectual Property Office commissioned research ‘Rethinking IP in the Digital Manufacturing Age? A Foresight Approach to the Use of 3D Printing in Emerging and Developed Economies and its Implications for IP Law’ (2016-2018).

Using doctrinal and empirical methods, this international, interdisciplinary 18-month project is examining the current impact of 3D printing on intellectual property law and practice in a number of jurisdictions (including UK, US, China, Russia and India), as well as employing innovative ‘horizon scanning’ techniques to project possible future scenarios for the technology’s implementation, with a particular focus on how this is, and will, interact with existing intellectual property laws, their conceptual bases and the enforcement of these laws internationally.
This presentation, occurring at the project’s half-way point, will discuss the current state of affairs as regards 3D printing’s development and implementation across these jurisdictions and interaction with IP laws (copyright, patents, trademarks, design rights and trade secrets). Then, based on the horizon scanning work conducted so far, a picture of possible 3DP/IP futures will be tentatively painted, along with possible implications for IP laws currently in existence. Issues which will be covered include: 3D scanning and reverse engineering; technical IP enforcement in 3D printing processes; in/consistent approaches across jurisdictions and individual IP rights; IP subject-matter and the 3D printing process; and intermediary liability regimes. Some tentative conclusions will be offered based on this work, along with some future directions for 3D printing and IP research.

About Angela Daly

Dr Angela Daly is Vice Chancellor’s Research Fellow in Queensland University of Technology’s Faculty of Law (Australia) and a research associate in the Tilburg Institute for Law, Technology and Society (Netherlands). She is a socio-legal scholar of technology and is the author of *Socio-Legal Aspects of the 3D Printing Revolution* (Palgrave Macmillan 2016) and *Mind The Gap: Private Power, Online Information Flows and EU Law* (Hart 2016). She is lead Chief Investigator of UK Intellectual Property Office funded project ‘3D Printing and IP Futures’.
Do we still need IP Offices?

Nicolas Binctin, Université de Poitiers, France

The history of industrial Property is linked with IP offices. But we are aware that IP can exist without such offices as it happens for copyright or unregistered European design. A patent or a trademark can certainly legally exist without an administrative procedure in front of an office. And if we have to conserve the IP Offices, their implication in the delivery of IP rights may change.

The IP offices have to control the quality of the owned intellectual good, but, in practice, the quality of this control is far from what we can expect. The offices never warrant the quality of their procedure and it is usual that the IP office statutes provide a full exclusion of warranties. Many offices never control the full set of criteria to own a patent, design or trademark.

The IP offices can develop their own doctrine that cannot be in the line of the law... This is shown by the gap between the USPTO doctrine and the USSC jurisprudences on software and genetics patents, or the gap that exists between the EPO and the EU Commission in the Tomato and Broccoli case.

The main part of the procedure lives in the opposition when a third part analyses the asked IP right and contests it. At that stage of the procedure, the office becomes a jurisdiction..., which, in the current system, may lead to a real risk of conflict of interest and a difficulty to warrant the judges’ independence.

In this context, we can try to mobilize the new technological solutions to change the way to obtaining patent, design or trademark. Instead of the physical offices as we actually know, we can imagine a web service through which you can upload the description of your intellectual good (design, invention, brand).

Some algorithms could control the quality of the intellectual good in front of the previous disclosures. It is already done by some offices for some researches, especially in China for designs. That would not be worse than many current research reports that are influenced by data mining. Then, a publication can be done, and open an opposition period which can be conducted in front of a judge, in the model of the German Patent Court which mixes jurists and technicians. The used algorithms will be adapted according to the evolution of the local jurisprudence.

At the end of the process, the delivery IP right would be included in a dedicated block chain which would secure the right of the owner, the opposition to the third, and would mention all the territories of validation. A mechanism of smart contract could be built to pay taxes to the States, and another one could be imagined for compulsive licences.
The dynamism of the access to IP rights can be changed with the new tech, the value or the quality of each IP right cannot be worse than the actual one, and the cost of the procedure could be subsequently cut.

**About Nicolas Binctin**

Nicolas Binctin is Professor at the Faculty of Law of the University of Poitiers, where he manages a postgraduate program on Research and Innovation Development Law and a postgraduate program on IP Law. Nicolas Binctin teaches Business and Intellectual Property Law in its various components, in universities of Poitiers and Paris XII-UPEC, and at the School of Law and Management of the University Paris II Assas-Panthéon.

He has been invited professor since 2015 by the Academy of Organisation Africaine de la propriété intellectuelle (OAPI) in Yaoundé, Cameroun, and the Djibouti University. He is regulated invited for many conferences in France, Tunisia, Japan, Italy, Austria, Belgium, Canada, China, and Switzerland and has been one of the French reporters for the Wien Congress of the International Academy of Comparative Law in 2014, a position that he will retake in 2018, and for the ALAI Bonn Congress in 2015.

Author of a thesis entitled *Le capital intellectuel* (published by LexisNexis in 2007), he has published many articles in French and English, a monography on Corporate strategy and IP, and the 4th edition of his Law book on French and European IP law was published in September 2016 by Lextenso-LGDJ. He is the co-head of the working group for the codification of the EU IP law with Gerald Spindler that was launched by the Foundation for the Civil Law Initiative. He is expert or arbitrator in different fields of IP law and Business Law.
Digitally-Manipulated Personal Photographs: Tensions, Taxonomies and Treatments

S Che Ekaratne, School of Law, University of Canterbury, New Zealand

With growing developments in photo-manipulation technology, the digital alteration of photographs is becoming more frequent and more sophisticated. This can conflict with community and social expectations that a photograph depicts 'real life'. It can also conflict with business norms, such as within the media, regarding the circumstances under which digital alteration should be disclosed to the relevant audience.

When the photograph altered is that of a recognisable human individual (rather than of an object or a scene), these issues come into sharper focus. If the photo-manipulation is without the individual's consent, intellectual property goals can come into tension with norms relating to human dignity and personality.

This paper first identifies several different categories of photo-manipulation that are particularly relevant to photographs of recognisable individuals. Drawing on illustrative examples, the paper goes on to compare the copyright treatment of selected photo-alterations under United States and New Zealand copyright laws. Taking into account the objects and purposes of copyright law, as well as social and business norms, the paper analyses whether the identified different categories may merit different forms of copyright-infringement analysis. Accordingly, the paper suggests copyright-infringement approaches applicable to these photo-manipulation categories. While these recommendations are mainly with reference to New Zealand law, they may also be helpful in other jurisdictions with similar copyright regimes.
About S. Che Ekaratne

S. Che Ekaratne is a lecturer at the University of Canterbury School of Law in New Zealand. She holds a B.A. from Yale University, a J.D. from Harvard Law School and an LL.M. from the University of Bristol. Her research interests include comparative aspects of intellectual property law and entertainment law. She is currently involved in doctoral research on the unauthorised creation and dissemination of altered personal photographs. Her research has been published in the *Harvard Human Rights Journal*, the *Media and Arts Law Review* and the *Journal of Intellectual Property Law & Practice*. Before entering academia she was an attorney at a law firm in Washington DC.
The Purpose and Characteristics of Copyright Law in Internet Era

Weijie Huang, Faculty of Law, University of Hong Kong
(co-author) Yahong Li, Faculty of Law, University of Hong Kong

Copyright law is characterized by exclusive rights for a singular author/owner (Elkin-Koren, 2011), tailored to the Industrial Age which has brought mass production of knowledge products, a large reading public, and a group of professional authors who relied on entrepreneurs to market and disseminate works in tangible forms such as books, photographs and CDs (Hesse, 2002). Exclusive rights were necessary for authors who lived on writing, and even more important for entrepreneurs who invest heavily in producing and distributing knowledge products. That is why copyright law has been considered as a trade regulation (Lemley, 2015, 2014). Exclusive rights were also enforceable due to the tangible embodiments that constructed copyright law in a tangible property law approach with individualized ownership to promote efficiency (Cohen, 2011). Ideologically speaking, the Renaissance and Enlightenment movement also strengthened the romantic concept of individual geniuses and singular authorship (Craig, 2007).

However, in the Internet Era, the trade-oriented characteristic of exclusive right with singular authorship/ownership can no longer serve the purpose of copyright law, that is, to promote public access to knowledge and information by providing incentive to create. Exclusive right is not merely unenforceable because digital technology enables knowledge disseminated without tangible carriers, but also unnecessary because economic incentives are no longer the main driver for knowledge production and dissemination. The development of digital technology and Internet, which significantly reduces the costs of knowledge creation and dissemination, has generated a new phenomenon of UGC and a large group of prosumers. Internet enables great numbers of prosumers to collaborate with each other to produce and disseminate knowledge such as open-source software and wikis. The mode of self-motivated
peer production and publication in the Internet Age, along with the postmodern cult that regards works as the product of group wisdom rather than individual achievement, have seriously challenged the traditional concept of exclusive right based on singular authorship/ownership.

In order to continually fulfill the purpose of copyright law in the Internet age, this paper proposes, based on Li’s earlier work on remix (Li, 2017), to introduce a creativity-oriented users’ right approach to the current copyright regime to promote peer production and dissemination. Specifically, under this new approach, a right to use is created to allow users to use others’ copyrighted works without authorization for the purpose of creating new works, with a statutory obligation to compensate the copyright holder when the new work is commercially used. Rules governing multiple creators are articulated in light of the mode of production, and the rights and duties for the first user bind automatically on the subsequent users. Moreover, the originality standard for UGC is higher and the term of protection is shorter than those under the current copyright law. In short, the new approach attempts to coordinate copyright law with the private ordering of the user community to unleash creativity and enrich culture in the Internet Era.

About Weijie Huang

Weijie Huang, LL.B. and LL.M. (Sun Yat-sen University), is a Ph.D. Candidate in the Faculty of Law, University of Hong Kong. She got the 2017-2018 Fulbright-RGC Hong Kong Research Scholar Award and is studying in University of California at Berkeley, School of Law as a visiting student researcher from September 1, 2017 through June 30, 2018. Her research interest is user-generated content and copyright.
Session 4

The Many Purposes of Trade Marks

GBLT1
Session 4 Chair

Reto Hilty, Max Planck Institute for Innovation and Competition Law, Germany

Study of mechanical engineering at the Swiss Federal Institute of Technology Zurich (ETH Zurich; 1st intermediate exam). Study of law at the University of Zurich, school of law; doctorate in Zurich (1989). Head of department and member of board of Directors at the Swiss Federal Institute of Intellectual Property, Berne (1994–97). Postdoctoral lecture qualification in civil, intellectual property, competition and media law at the University of Zurich (2000). Full Professor of technology and information law at the Swiss Federal Institute of Technology Zurich (ETH) Zurich (2000 and 2001). From 2002 Director and Scientific Member of the Max Planck Institute for Innovation and Competition (Managing Director 2005–06, 2011–12 and 2017-19) and full Professor (ad personam) at the University of Zurich. Honorary Professor at the Ludwig Maximilians University, Munich, and a number of foreign Universities.
Many nations today allow registration of trademarks consisting of product configurations, colors, scents, sounds, tastes, textures, and other “nontraditional” trademarks. Advocates of trademark protection of this type of subject matter argue that these marks can become distinctive, and that misleading use of a source-distinguishing mark by competitors can cause consumer confusion and harm the distinctive quality of the nontraditional mark. Critics argue that many nontraditional marks are not distinctive, or are functional, ornamental, or decorative, and do not function properly as trademarks. They contend that granting exclusive rights to nontraditional marks can harm competition, and useful or artistic features of a product or packaging desired by consumers should be protected only by patent or copyright law or remain in the public domain for use by everyone.

This paper argues that nontraditional trademark laws may also conflict with the right to freedom of expression when the government grants and enforces exclusive trademark rights in certain types of nontraditional marks. These marks can express ideas, emotions, pleasures, or information unrelated to source-identification before and after they are claimed as trademarks. For example, an artist’s creation of a human skull design or shape communicates a message regardless of whether it is displayed in a painting or sculpture, or used in connection with merchandise such as Crystal Head Vodka sold in a glass bottle shaped like a skull or skull-shaped packaging for hot sauce. The color green—like the word “green”—can communicate an environmentally-friendly message when used in connection with the advertising or sale of products. A shape, color, scent, sound, taste, texture, or other product feature can constitute “expression” protected by the right to freedom of expression when it is used as a trademark or to communicate messages unrelated to source-identification. This paper also contends that trademark registration and enforcement of certain nontraditional trademarks may violate the free expression right protected in constitutions, human rights treaties, and other laws.

Many nontraditional marks are inherently valuable, meaning this subject matter was valuable in the marketplace for its intrinsic qualities before it was adopted as a trademark. Trademark registration and enforcement of trademark rights in this subject matter is more likely to restrict free expression.
compared to trademark laws regulating other types of marks whose value is primarily created by the trademark owner, such as the LOUIS VUITTON brand name for handbags or Nike Inc.’s swoosh logo for shoes.

Nations can reduce the conflict between trademark rights and the right to freedom of expression by declining to register and enforce trademark rights in nontraditional marks that express messages unrelated to source-identification, or provide only a narrow scope of protection for such marks. At a minimum, countries should consider increasing the requirements for registration of such marks, not allow claims for dilution of nontraditional marks, add defenses explicitly allowing certain nonmisleading or noncommercial uses of nontraditional marks, and focus on regulating misleading commercial expression in nontraditional trademark laws.

**About Lisa Ramsey**

Lisa Ramsey is a Professor of Law at the University of San Diego School of Law, where she is a founding member of the Center for Intellectual Property Law and Markets. She teaches and writes in the areas of trademark law, intellectual property, and international intellectual property. Her scholarship focuses on the potential conflict between trademark rights and free expression in national and international laws. Professor Ramsey’s publications include *A Free Speech Right to Trademark Protection?,* 106 Trademark Reporter 797 (2016); *Reconciling Trademark Rights and Free Expression Locally and Globally,* in *International Intellectual Property: A Handbook Of Contemporary Research* 341 (Daniel Gervais ed. 2015); *Mechanisms for Limiting Trademark Rights to Further Competition and Free Speech,* 44 *International Review of Intellectual Property and Competition Law* 671 (2013) (with Jens Schovsbo); *Free Speech and International Obligations to Protect Trademarks,* 35 *YALE J. INT’L L.* 405 (2010); *Branding on Social Networks: Trademark Infringement By Impersonation of Markholders,* 58 *BUFF. L. REV.* 851 (2010); and *Increasing First Amendment Scrutiny of Trademark Law,* 61 *SMU L. REV.* 381 (2008). Before joining the University of San Diego law faculty, Professor Ramsey was an intellectual property litigator for several years in San Diego, California.
Market Definition’ as a Tool for Assessing Anti-Competitive Effects of Registering Non-Traditional Trade Marks

Lavinia Brancusi, Faculty of Canon Law, Department of Civil Law, Card. Stefan Wyszynski University, Warsaw, Poland

Market definition is a tool traditionally applied to explore the issue of market dominance/power for antitrust purposes. The key-concept of this definition constitutes the availability of substitutable goods, understood as the possibility for customers to switch to alternative products in case of a price increase.

Availability of substitutable goods has possible relevance also in trademark law, especially for functionality cases frequently featuring non-traditional trade marks (hereafter NTTMs). One of the reasons for denying trade mark protection for signs constituting product features is that the appropriation of such a sign would reduce competition by substitution, as other producers would be forced to incur additional costs by designing around these protected features and customers might not perceive such alternative products as meeting their specific demands and being good substitutes. The need to assess the extent and closeness of substitutes triggers the consideration whether antitrust perspective on products’ substitutability may be of some use for trademarks practice.

An interesting issue concerns the case of a narrowly defined market restricted to one product, especially determined by long-term branding strategies. There is a growing interest in antitrust practice to take into account branding as an important factor to induce low responsiveness to price changes and affect the substitutability of products by hampering the entry of new competing alternatives. This could be of specific interest for NTTMs, which due to low inherent distinctiveness are filed for registration after a period of intensive marketing and promotion, frequently involving complex branding strategies.

The purpose of the present analysis is to sustain a more precautionary approach when conferring registration or examining the validity of NTTMs in the light of some reflections from antitrust practice.
About Lavinia Brancusi

Dr. iur. at University of Warsaw with an awarded doctoral dissertation in design law (2010), Lavinia Brancusi is an Assistant Professor (ad iunct) at Cardinal Stefan Wyszyński University in Warsaw with lectures on civil law and industrial property law. She collaborates with the IP department of a prestigious Polish law office. Born in Bucharest, Romania, she graduated from Bucharest University, Faculty of Law as well as Warsaw University, Faculty of Law and Administration. She also held an one-year scholarship at Robert Schuman University in Strasburg, Faculty of Law.

Inventing Harm: Reassessing the Origins and Reception of the First Trade Mark Anti-Dilution Statutes

Michael Handler, Faculty of Law, University of New South Wales, Australia

Anti-dilution measures are a long-established feature of trade mark laws throughout the world. The most notable provisions are those contained in federal US law (preventing famous marks from being ‘blurred’ or ‘tarnished’ in the absence of consumer confusion) and in the harmonised EU regime (preventing non-confusing use that is detrimental to the ‘distinctive character’ or ‘repute’ of a mark with a reputation). Such measures show an acceptance of the idea that the purpose of trade mark law is not merely to protect marks as mere source identifiers, but also to safeguard their commercial magnetism by proscribing conduct that might negatively impact on the investment undertaken in constructing and maintaining their identity as brands.

The origins of federal US and EU anti-dilution laws are traditionally traced to a series of mid-twentieth century provisions contained in US state statutes and harmonised Benelux law, respectively. Both sets of provisions were introduced at a time when a number of commentators were expressing scepticism as to the traditional objects of trade mark law and were calling for more extensive protection than was available under existing infringement actions. The provisions are commonly understood as being the first, unequivocal recognitions by legislatures that trade marks serve additional, non-source-identifying functions and could therefore be harmed by third party conduct that did not generate consumer confusion. Subsequent US and EU anti-dilution laws are held up to be mere extensions or elaborations of these initial provisions.

This paper calls into question the orthodox histories of how the US and EU came to embrace anti-dilution laws. An analysis of the US state statutes and Benelux laws in their legal and historical context reveals that the harms against which they were designed to protect were much narrower than has been
appreciated. I suggest that, notwithstanding the breadth of the language of these early provisions, the most compelling reading of them is that they were intended only to expand the scope of the traditional, confusion-based infringement action. Instead, the acceptance of the harms of blurring and tarnishment, absent source confusion, came much later, with these harms effectively being invented by US and Benelux courts. The weakness of the normative foundations of the modern US and EU anti-dilution actions – especially when combined with the extensive body of recent critical scholarship that has sought to argue that the harms of blurring and tarnishment never rise to a level that warrants legal intervention – should thus give us cause to reflect on what the proper purposes of trade mark law ought to be.

**About Michael Handler**

Michael Handler is an Associate Professor in the Faculty of Law at the University of New South Wales. Michael’s main field of research is trade mark law, and his work also covers copyright and the laws regulating geographical indications of origin. He is the co-author (with Robert Burrell) of *Australian Trade Mark Law* (Oxford University Press, 2nd ed, 2016), and has written numerous journal articles and book chapters on various aspects of trade mark law, theory and practice over the past decade, which have been published in Australia, Europe and the US. He is also the co-author (with Kathy Bowrey, Dianne Nicol and Kimberlee Weatherall) of the IP casebook *Australian Intellectual Property: Commentary, Law and Practice* (Oxford University Press, 2nd ed, 2015). His current research focuses on reputational harm in trade mark law, on the accommodation of rights in unregistered marks within registration systems, and on the relationship between functionality, distinctiveness and trade mark use.
Trademark Law and the Public Interest (in the Luxury Industry): Can Anti-Dilution Protection Promote Higher Quality Products?

Irene Calboli, School of Law, Singapore Management University, Singapore and Texas A&M University School of Law, USA

In this article, I analyze the anti-dilution rule in trademark law, and offer a possible (and narrower) interpretation of it, which could be more compatible with the public interest. Notably, I argue that anti-dilution protection could be accepted, and normatively justified, when it refers to protecting marks that identify products of superior and unique quality that require considerable extra investment, better raw materials, and manufacturing skills compared to mass produced products.

In particular, my analysis focuses on the luxury industry, an industry in which marks are frequently protected against dilution because they can be proven to be well-known, famous, or have a reputation (depending on the standards required by national laws for such protection). The luxury industry is an interesting example because luxury products are often thought to be of superior quality and unique characteristics. Yet, in recent years, the luxury industry has shifted from products of superior quality to embrace a culture of prestige for the masses, or “masstige” – through broader, and apparently more profitable, appeal to the mass market. In other words, luxury trademarks have gradually transformed from the indicators of objets de luxe—meticulously made, frequently by hand, by master artisans—into the ambassadors, or often merely the advertisers, of the products mass-marketed worldwide by multinational luxury conglomerates. These new luxury corporations have become increasingly more receptive to “downward” brand extension or “pyramidal” luxury.

However, this shift (certainly very profitable for corporations) brings into serious question whether the luxury marks are still deserving of anti-dilution protection since they are increasingly diluted by trademark owners themselves. What is left of the promise of consistently superior product quality that is one of the reasons for granting anti-dilution protection to famous luxury trademarks?

Certainly, anti-dilution protection was created to protect fame, and not product quality per se. Can the real objective of anti-dilution protection be reconciled with this extra protection only being granted to marks relating to products of superior quality that are famous because of that quality, rather than to marks that are recognized by a large percentage of the population? In this article, I argue that luxury
conglomerates should not be entitled to claim protection against dilution of their marks when they themselves regularly “whittle away,” or self-dilute, the uniqueness of their marks through numerous brand extensions to gain more profits. Yet, I also argue that dilution protection could be justified for marks that continue to invest in superior product quality and produce exclusively in high-end markets without engaging in brand extension. My considerations in this regard focus on the public benefits that luxury maisons may offer to society as a whole compared to the business model of luxury conglomerates and mass-produced masstige products. Ultimately, I conclude that anti-dilution protection should be reserved for rare circumstances and only when a clear public interest gain could be derived from the use of the rule beside the benefit for trademark owners.

About Irene Calboli

Irene Calboli is Lee Kong Chian Fellow, Visiting Professor, and Deputy Director of the Applied Research Centre for Intellectual Assets and the Law in Asia, Singapore Management University, School of Law. She is also Professor of Law at Texas A&M University School of Law, and Transatlantic Technology Law Fellow at Stanford University. She has held long-term and short-term academic positions in several prestigious institutions, including the National University of Singapore, Bocconi University, Hanken School of Economics, King’s College London, the University of Strasburg, the University of California at Berkeley, and the Max-Planck Institute. Irene is a dedicated teacher and a prolific scholar. Her recent books include: Diversity In Intellectual Property: Identities, Interests, And Intersections (Cambridge University Press, 2015, with S. Ragavan), the Research Handbook On Intellectual Property Exhaustion And Parallel Imports (Edward Elgar, 2016, with E. Lee), and Geographical Indications At The Crossroads Of Trade, Development, And Culture (Cambridge University Press, 2017, with Ng-Loy W.L.). She is a peer reviewer for several leading journals and a member of the Editorial Board of the Trademark Reporter, the Queen Mary Journal of Intellectual Property, and the WIPO-WTO Colloquium Papers. Irene is an elected member of the American Law Institute and an associate member of the Singapore Academy of Law. She is currently the Chair-Elect of Art Law Section of the Association of American Law Schools, and a member of: the Council of the International Law Association (Singapore Branch); the Board of the European Policy for Intellectual Property Law Association; and the Legislation and Regulation Committee of the International Trademark Association. She regularly acts as expert for international organizations and national governments. Recently, she was an expert for the World Intellectual Property Organization, the European Intellectual Property Office, the Intellectual Property Office of Singapore, and the Ethiopian Intellectual Property Office.
What are Trade Marks For? A Case Study in Coffee

Megan Richardson, Melbourne Law School, University of Melbourne, Australia
(co-author) Jill Klein, Melbourne Business School, University of Melbourne, Australia

According to conventional wisdom the rational function of trade marks is to reduce consumer search costs. From the 19th century British judges, legislators and textbook writers identified trade marks with the workings of an industrial economy, making it easier for industrial manufacturers to inform consumers of the reliable source of their goods. Even the challenge to this idea from the American Frank Schechter, caught up in the legal realist movement at Columbia Law School in the late 1920s, was premised on identifying an alternative rational function of trade marks in a new-age mass-market American economy. As Schechter pointed out, where manufacturers and consumers are distant, trade marks allowed anonymous manufacturers to ‘reach over the shoulder[s]’ of sellers to communicate reliable qualities of their goods with or without identification of the actual source. In post-war America, Ralph Brown at Yale Law School may have criticised the use of trade marks to persuade consumers to indulge in a pleasurable profligacy, but he continued to maintain that there was a rational function of trade marks that the law could support in informing consumers about reliable qualities of their goods. And by the 1980s lawyer-economists Richard Posner and William Landes at the University of Chicago were explicitly identifying the rational function of trade marks with reducing consumer search costs, signifying reliable qualities of goods (and services) to consumers as associated with a single source.

An example offered by Landes and Posner was the use of the trade mark ‘Sanka’ as the brand of a popular freeze-dried coffee manufactured by General Foods. According to their analysis ‘Sanka’ designates this reliable brand of decaffeinated coffee and so consumers are saved the time of having to search it out in more cumbersome ways. Yet our research into consumer perceptions of coffee brands in Australia discovers that, when asked what brands they look for when purchasing packets of coffee, respondents gave
a variety of answers including the name of the source (eg Vittoria), emotionally-appealing terms such as ‘Oro’ (meaning ‘gold’ in Italian although most of our respondents did not know or apparently care about its meaning), along with more generally descriptive aspects such as ‘100% Arabica’. This leads us to question the ‘rational’ function of trade marks as signifying a reliable source and associated qualities of consumer products and to posit instead a more eclectic signifying function of trade marks, responding to a range of rational wants and emotional desires that consumers may seek to satisfy in their purchasing decisions.

About Megan Richardson

Session 5

Reconsidering Incentives in Times of Social and Cultural Change

GBLT1
Session 5 Chair

Abbe E L Brown, School of Law, University of Aberdeen, UK

Professor Abbe E. L. Brown is a legal researcher and teacher at the University of Aberdeen in Scotland. Abbe’s main research interest is the laws relating to intellectual property and innovation, their intersection with other legal fields, and the impact of this on key societal challenges.

Abbe’s current projects involve intellectual property, climate change and technology; intellectual property, disability and personhood. Key publications are *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology* (Edward Elgar 2012), the edited collection *Environmental Technologies, Intellectual Property and Climate Change* (Edward Elgar 2013), several editions of the respected OUP textbook *Contemporary Intellectual Property: Law and Policy*, many contributions to internationally respected collections and journals, and with Professor Charlotte Waelde a forthcoming edited collection *Intellectual Property and the Creative Industries* to which many ATRIP members have kindly contributed. Funding sources for her research include the Modern Law Review, the UK Arts and Humanities Research Council, the Carnegie Trust for the Universities of Scotland and the Wellcome Trust. Abbe sits on the Technology Committee of the Law Society of Scotland, the Public Benefit and Privacy Panel of NHS Scotland and the Executive of the British and Irish Law, Education and Technology Association and is a frequent peer-reviewer for publishers, journals and funders. Abbe has a PhD from the University of Edinburgh, a Diploma in Intellectual Property Law and Practice from the University of Bristol, an MA from the University of Cambridge and is a solicitor admitted to practise in England and Wales, Victoria (Australia) and Scotland. She is @IGFTowardAccess.
Copyright and Distributive Justice

Justin Hughes, Loyola Law School, Los Angeles, CA, USA

When concerns about copyright’s effect on distributive justice are raised, those concerns typically focus on access to information. Most of these discussions assume that by conferring control over access to copyrighted works, copyright in general concentrates wealth with corporations and a few individuals. This article takes a different perspective, proposing that copyright has been and remains an important tool for wealth distribution to a large and diverse group of individual creators. Our focus is not on the distribution of copyrighted works — who controls them and who has access to them. Instead, we concentrate on the distribution of income that flows from sales of copyrighted works. The income streams created by copyright, we argue, constitute another of copyright’s contributions to distributive justice.

Using a Rawlsian framework for distributive justice, we consider – both theoretically and empirically – how copyright law allows individuals to earn income and build wealth. We provide a sketch of Rawls’ theoretical structure for distributive justice, including a detailed look at Rawls’ canonical “Difference Principle.”

With Rawls’ framework in the background, we first show that copyright contributes vitally to the incomes of average-earning creative professionals (with a focus on the music industry). Second, we argue that copyright is a uniquely effective institution in providing “equality of opportunity” in wealth accumulation. In this regard, we propose that copyright has been central to whatever limited “equality of opportunity” African-Americans have enjoyed in the United States. Indeed, for the wealthiest African-Americans, copyright has been the most important form of property for social and economic advancement. This is so, we argue, because copyright is one of the few social institutions that permit a person to turn labor directly into economic assets (in the form of copyrighted works), and hence to create real, sustainable wealth starting only with personal labor. This, we conclude, is an important dimension of copyright’s role in overall distributive justice.
About Justin Hughes

Justin Hughes is the Hon. William Matthew Byrne Professor of Law at Loyola Law School in Los Angeles, where he teaches international trade and intellectual property courses. From 2002 until 2013, he taught at Cardozo Law School in New York. From 2009 until 2013, Professor Hughes also served as Senior Advisor to the Undersecretary of Commerce for Intellectual Property. In that capacity, he was chief negotiator for the US at the Diplomatic Conferences that completed the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty to Facilitate Access to Printed Works for the Blind (2013).

Educated at Oberlin and Harvard, Professor Hughes practiced international arbitration in Paris and, as a Henry Luce Scholar, clerked for the Lord President of the Supreme Court of Malaysia. From 2006-2009, he was Chairman of the Technicolor/Thomson Foundation for Film and Television Heritage based in Paris. Professor Hughes has also done democracy development work in Albania, Bosnia, El Salvador, Haiti, and Mali. More information can be found at www.justinhughes.net.
What Can a History of Copyright and Cartography Tell Us about the Object and Purpose of Intellectual Property Law?

Isabella Alexander, Faculty of Law, University of Technology, Sydney, Australia

While it may be trite to point out that there are complexities in how intellectual property interacts with changing technologies, detailed examination of how such complexities arise and are worked out in real life situations can still provide important insights. At a time when policy-makers, practitioners and academics are all calling for ‘evidence based policy’, the contribution that history can make as a source of evidence must not be overlooked. This paper will draw on some of the early findings of the author’s project on copyright history and cartography to consider what we can learn from the particular case of maps in Great Britain, as protection shifted from being by royal licence in the 16th and 17th centuries to a statutory regime in the middle of the 18th century. It will consider how this shift came about and what its impact was on those involved in selling, buying and producing maps. While the technology of map-making changed little in this period, the social, cultural and economic conditions of production changed substantially. Moreover, changing technology had a dramatic effect on what was actually depicted in maps, as Enlightenment ideals and scientific advances pushed mapmakers to ever greater levels.
of accuracy and completeness. The paper will explore the role played by copyright law in this transformation and consider how these changes may in turn have impacted on views about what the object and purpose of copyright law should be.

**About Isabella Alexander**

Isabella Alexander is an Associate Professor in the Faculty of Law at the University of Technology Sydney. She researches and teaches in intellectual property law and legal history and is the author of a monograph, *Copyright and the Public Interest in the Nineteenth Century* (Hart, 2010), as well as articles and book chapters in the fields of copyright history and design rights. Her current project, *Copyright and Cartography: Understanding the Past, Shaping the Future*, is funded by an Australia Research Council Discovery Grant.
During the past few years, we have witnessed the collision of two international legal frameworks that, for decades, developed separately alongside each other—investment treaties and international IP agreements. In analyzing the interaction between these parallel public international legal regimes, it is worth examining the object and purpose of each in order to determine where they are complementary and where they are in conflict. To the extent that there is agreement as to the purpose of intellectual property law, one of the stated aims of intellectual property protection is to provide incentives for creation and invention. ISDS is included in investment agreements to provide a neutral form of resolving disputes between foreign investors and the states in which they have invested—effectively an incentive to attract foreign investment in markets that might otherwise struggle to do so.

The aim of free trade underpins both ISDS and the existing international intellectual property system. But intellectual property—the nature, scope and existence of which can vary across borders—has always been a tricky subject to situate within free trade principles, due to its intangible nature and the importance of non-commercial values, but, more fundamentally, because of the threat of overprotection causing direct harm such principles. Rather than focusing on whether or not intellectual property...
property rights should be defined as assets or investments for the purpose of ISDS, this paper examines the objects and purposes of the ISDS and international IP systems, taking a long, historical view of their development, and examining the complicated values and overlapping incentives to states and potential foreign investors who may also be owners of intellectual property across jurisdictions.

About Barbara Lauriat

Dr Barbara Lauriat is a Senior Lecturer in Law at King’s College London, teaching and conducting research on intellectual property law subjects. She is also a Research Fellow of the Oxford Intellectual Property Research Centre (OIPRC) in the University of Oxford Law Faculty, an Adjunct Professor at the Notre Dame London Law Centre, and an Associate Academic Fellow of the Honourable Society of the Inner Temple. She serves on the editorial board of Arbitration International and the King’s Law Journal and is the academic consultant for Copinger & Skone James on Copyright.
The Object and Purpose of Intellectual Property: A Blessing or a Curse for TK?

Lida Ayoubi, Auckland University of Technology, New Zealand

The object and purpose of intellectual property rights is often discussed in the context of the interface of intellectual property and human rights. Articles 7 and 8 of the TRIPS Agreement, among other instruments, can act as guidelines for defining the scope and function of intellectual property rights, particularly in connection to socio-economic and cultural human rights that are dependent on IP works. The objectives and principles of intellectual property, as identified by TRIPS, can inform the mechanisms of IP policy and law making, management, and enforcement. For instance, the Marrakesh Treaty for the Blind and Visually Impaired recently highlighted some of those objectives and principles in its Preamble by referencing concepts such as the mutual advantage of rightholders and users, public interest, and the importance of social and economic welfare of both groups. Countries have used the principle of balance between the interests of producers and users of IP works to advocate further use of the built-in flexibilities in the international copyright law system. One of the areas where the complex interconnectedness of IP and human rights manifests itself is the relationship between IP and indigenous rights. A growing body of literature has been dedicated to outlining the difficulties that arise because of the incompatibility of the existing model of IP and indigenous traditional knowledge (TK) and Traditional Cultural Expressions (TCEs). This paper aims to evaluate the underlying rationales for IP and its objectives and purposes in relation to protection, exploitation, and appropriation of indigenous traditional knowledge and cultural expressions. The paper argues that IP’s rationales and purpose are not in complete incompatibility with creation, use and dissemination of indigenous works. Therefore, the paper first starts by investigating whether the object and purpose of IP currently influences the way national and international policy is made around protection and exploitation of indigenous TK and TCEs and derivative works with indigenous origins. The paper then explores the question of whether a further focus, or readjusting of an existing focus, on IP’s objectives and purpose can contribute to the cause of indigenous peoples regarding their knowledge and culture.
About Lida Ayoubi

Lida Ayoubi is a Lecturer at Auckland University of Technology (AUT), Law School where she teaches intellectual property law and acts as the Deputy Director for AUT Centre for Private Law. She completed her LLB at University of Tehran in Iran before graduating with an LLM in International Human Rights and Intellectual Property Law from Lund University in Sweden. She received her PhD degree from Victoria University of Wellington in 2015. Her doctorate investigated the case of access to copyright protected works for the blind and visually impaired persons as an example of the interface between intellectual property and human rights law. She has contributed to different research projects in academic and other institutions including the World Intellectual Property Organization and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. She has presented and published on different themes arising from the interface of human rights and intellectual property rights with a focus on the relationship between copyright and socio-economic and cultural rights and rights of indigenous peoples.
Intellectual Property and the Criminal Law

Kimberlee Weatherall, Law School, University of Sydney, Australia

This paper examines recent developments in the use of criminal liability and criminal sanctions in IP. It looks into the very thorny issues that arise in such a technical area of the law, including concepts of intent, the extension of secondary criminal liability (‘aiding/abetting’ liability) and how criminal concepts do or do not mesh with the way that our thinking about liability arises in the civil context. It also discusses the links between the expansion of criminal law liability and the international web of mutual assistance treaties governing extradition and extra jurisdictional enforcement activities.

About Kimberlee Weatherall

Kimberlee Weatherall is a Professor of Law at the University of Sydney Law School, teaching and researching across intellectual property law and the IP-trade nexus. Kimberlee has published extensively in leading Australian and international journals on issues ranging from
digital copyright, and bilateral and multilateral trade agreements and IP, to the conception of the consumer in trade mark law in a 2017 article in the *Modern Law Review*. She is the editor, with Dr Rebecca Giblin, of *What if we could Reimagine Copyright* (2017, ANU Press), a provocative collection of essays that explores the goals of copyright law and how they might be better achieved if it could be redesigned from scratch. Her ARC-funded projects include two industry-linked grants, on the conception of consumers in trade mark law and on the availability and use of ebooks in Australian public libraries, as well as a sole-CI Discovery Grant addressing the development of IP enforcement provisions in trade agreements and other treaties. She has regularly given evidence to Parliamentary Committees including the Joint Standing Committee on Treaties, and was a member of the Australian Government’s Advisory Council on IP and the Advisory Committee Member to the Australian Law Reform Commission Inquiry, *Copyright and the Digital Economy*. Kimberlee is also a board member of the Australian Digital Alliance.
> Intellectual Property Rights in the Recreational Cannabis Market: Craft or Commodity?

Jeremy de Beer and Alyssa Gaffen, University of Ottawa, Canada

The Government of Canada has taken significant steps towards legalizing the consumption of cannabis for recreational purposes, in particular by tabling the Cannabis Act. Going forward, the recreational cannabis industry promises to be lucrative, and among the best ways to capitalize on this economic potential is with exclusive intellectual property rights (IPRs). Like other cash crops, the uptake of IPRs in cannabis may encourage a commodity-based agroindustry with a few large companies leading the market. However, the legal, scientific, and economic particularities surrounding IPRs in recreational cannabis may instead foster a craft cannabis industry, with many small-scale or artisan businesses. Either way, Canada’s recreational cannabis industry will influence and be influenced by the uptake of IPRs for cannabis and cannabis business.

Following an introduction in Part I, Part II of this article explores Canada’s new legal framework for the recreational cannabis market in light of the current political and legal environment. Part III surveys intellectual property regimes that may be most relevant to recreational cannabis, including plant breeders’ rights, patents, and trademarks. Part IV superimposes these regimes to reveal the issues likely to shape this industry. We consider legal-scientific issues, such as whether it is technically feasible to breed cannabis with protectable traits. And, we consider legal-commercial issues, such as whether restrictions on cannabis-related advertising might impact the use of cannabis trademarks.

We conclude, in Part V, that the use of IPRs to control the breeding, production, and distribution of recreational cannabis could lead to two plausible scenarios. A craft-based industry would have little use for patents or plant breeders’ rights, instead using trademarks to provide quality assurance in a market with simple and direct supply chains. A commodity-based industry would rely more heavily on patents and plant breeders’ rights to protect significant investments in cannabis breeding, and likely see separation between the roles of breeders and growers. We anticipate seeing elements of both markets in the near future. In the longer term, which type of cannabis industry materializes will depend, in part, on answers to the key legal questions we raise in this article.
About Jeremy de Beer

Jeremy de Beer is an award-winning professor at the University of Ottawa’s Faculty of Law. He is a co-founding director of the Open African Innovation Research network, Open AIR, and a Senior Research Associate at the IP Unit, University of Cape Town. As a practicing lawyer and expert consultant, he appears regularly before the Supreme Court of Canada, advises businesses and law firms both large and small, and consults for agencies from national governments and the United Nations. Read more his full biography at JeremydeBeer.com.

About Alyssa Gaffen

Alyssa Gaffen is a fourth-year law student and Research Fellow with the Open African Innovation Research (Open AIR) Network. She is completing a Dual JD/JD program between Michigan State University College of Law, in the United States, and the University of Ottawa Faculty of Law, in Canada. In 2018, Alyssa will graduate with two law degrees and start her practice as an Articling Student at Gilbert’s LLP in Toronto. Alyssa’s research areas of interest include a wide range of intellectual property (IP), technology, and innovation law topics, such as gender and innovation, measuring innovation (metrics and policymaking), the sharing economy (especially ride-sharing), international IP regimes, and Canada’s emerging recreational cannabis industry.
Session 6

From Trade Secrets to Patent Purpose

GBLT1
Session 6 Chair

Alexander Peukert, University of Frankfurt, Germany

Alexander Peukert is professor of civil law and commercial law with a specific focus on international intellectual property law at Goethe University Frankfurt am Main, Cluster of Excellence “The Formation of Normative Orders”. He studied law and obtained his Dr. iur. (s.c.l.) at the University of Freiburg (1993-1999). After his second state examination (2001), he practiced law in a Berlin law firm specializing in copyright and media law. From 2002 to 2009, he was senior research fellow and head of the U.S. department at the Max Planck Institute for Intellectual Property and Competition Law in Munich. In 2008, he was awarded the qualification of university lecturer (Habilitation) by Ludwig Maximilians University, Munich. He teaches international IP law at the universities of Strasbourg (Intellectual Property Law and Management), Lyon III (LL.M. International and European Business Law), and Alicante (LL.M. IP). His main research interest is in intellectual property and unfair competition law.
The Problematic Object and Purpose of Trade Secret Protection

Niklas Bruun and Nari Lee, Hanken School of Economics, Helsinki, Finland

Trade secret occupies an interesting place in the system of law as well as intellectual property (IP) law. In the general system of law, it is not clear whether the protection is granted as a form of compensation against broken promise (confidence), or as a punishment for wrong doing (tort) by causing harm to others (theft). IP protects clearly innovative and creative endeavors (patent and copyright), or investment in the creation of some intangible meanings represented by signs (trade mark).

The protection of IP thus is tied to the quality of the object of protection. Requirements for protection for patents and copyright both demands qualitatively the object of protection is worthy of patent or copyright protection. Trade mark protection, although conceptually different from patent and copyright as they protect investments in the signs and the goodwill that it generated, similarly demands the objects that are subject for protection to meet certain qualitative and essentialist criteria of itself. Industrial design protection equally requires that the design meets qualitative standards - to be novel and have individual character to be registered, among others. Regardless of its oddity, it is also a family member of whom we have heard a lot lately.

Together with the discussion of data protection, Internet of things, it has been claimed that the digitalization and technological development have made it easy to not only imitate and duplicate other’s intellectual achievements. We also have heard claims that that the digitalization and developments in data collection, aggregation, processing technologies have made it easy to break protective mechanisms, giving rises to demands for more protection based on law in addition to the technological self-help.

This paper discusses what are generally considered object and purpose for protection of trade secrets and how they are embedded in the substantive trade secret norms. We will use some examples taken from the EU Trade Secret Directive to identify whether there is a coherent object and purpose (at least a theory) of trade secret protection used or embedded in the text of the Directive.

Secondly, using the Directive and some member state’s legislative practices, we will explore how the understanding of object and purpose of the trade secret protection affects/conflicts or relates to other rights (IPR)/laws related to trade secret protection, and how it may lead to different articulation of rules. Finally, we will explore how object and purpose of trade secret protection can be read from the common foundations in the international agreements.
We conclude that not only the object and purpose of protection for trade secret substantively differs from the intellectual property but also there seem to be a general disagreement of what they should be. Harmonization effort without resolving the difference may lead to a piecemeal solution such as the Directive – a compromise which may be more confusing than harmonizing. As such, we warn against any further international harmonization agenda, without clear agreement on the object and purpose of protection for trade secret.

About Niklas Bruun

Niklas Bruun has for long held positions as Professor in Private or Commercial Law at Hanken School of Economics and the University of Helsinki and since the year 2000 he has been the Director of the IPR University Center in Helsinki which is the legal Academic institution for IP research and teaching in Finland with six universities as members. Professor Bruun has since 20-years been the leading Academic scholar in IP-law in Finland, especially in copyright and patent law. He has been the chair of several committees for law revisions of IP in Finland and has published several books and articles in the field, among others “Intellectual Property Law of Finland” (Kluwer). Recently professor Bruun has together with professor Nari Lee been in charge of a research project on innovation and IP enforcement in China together with a group of researchers from Europe and China (see the book “Governance of Intellectual Property Rights in China and Europe” edited by Lee-Bruun-Li 2016) and he has taken part in research regarding the European Unitary patent (see “Transitions in Patent Law” (eds Ballardini-Norrgård-Bruun 2015).

About Nari Lee

Nari Lee is Professor Intellectual Property Law at Hanken. She has studied law at Ewha Womans University in Korea and at Kyushu University, Japan (LL.M), and holds a Ph.D from University of Eastern Finland and Doctor of Laws (LL.D) degree from Kyushu University, Japan. Since 1996, she has researched and taught in the area of intellectual property and international trade in universities in Europe and in Asia. Until 2014, she has held the post of an affiliated research fellow at Max Planck Institute for Intellectual Property and Competition Law in Munich, Germany. Her current research interests include open innovation or other alternative regime of protection, fairness in the international trade agreements and IPR. For 2016-17, she is appointed a senior global Hauser fellow at the New York University School of Law, affiliated with Engelberg Center on Innovation Law and Policy. More information is available here: https://haris.hanken.fi/portal/en/persons/nari-lee(a2841e54-b6df-4527-813f-ebcefb0eb8b7).html
Encouraging ‘Openness’ in Genomics Research: The Impact of Trade Secrecy

Jane Nielsen, Faculty of Law, University of Tasmania, Australia (co-author) Dianne Nicol, Faculty of Law, University of Tasmania, Australia

This paper considers the complex legal issues associated with trade secrecy, data protection, patents and open access to data, with particular focus on health-related data. Data is increasingly seen as a valuable asset; nowhere is this manifesting more than in genomics where the amount of data generated in the laboratory and the clinic is proliferating. There is increasing capacity to sequence the whole genome of a person, identify variants linked with particular diseases, and link this information with other health and genealogical data.

These datasets are vital as primary ‘research tools’ in the laboratory, but are also important in the clinic for diagnostic testing and pharmacogenomics, in the courts for DNA profiling, and also for immigration and an array of other purposes. Data may be gathered in a multitude of ways, and may be raw or analytical. Analytical or annotated data often holds great value; collectively an annotated dataset is a critical research outcome. The free exchange of this data is desirable for scientific advancement particularly where it is not (easily) replicable. However, other factors may deter sharing. From the perspective of the individual, these include privacy and consent. From the perspective of the data collector, the proprietary and commercial value of the data are also relevant.

The Australian Productivity Commission recently noted the difficulty in mandating sharing or release of data in Australia’s public sector, despite repeated statements and initiatives favouring greater openness. The entrenched culture of risk aversion, reinforced by a range of policy requirements and approval processes, inhibits data discovery, analysis and use. There is a real difficulty, in compelling release, particularly where secrecy over the data is maintained through possession. Increasingly, trade secrecy seems to be rivalling other forms of intellectual property as a way of protecting research outcomes in genomic research. Obtaining empirical evidence as to the frequency with which trade secrecy is relied upon is difficult, but evidence obtained by the authors and other anecdotal evidence supports the proposition that trade secrecy is gaining ascendancy as a predominant form of protection.
This paper considers the various intellectual property regimes that potentially protect data as a research or clinical outcome in genomics, and critically evaluates their shortcomings. It pays particular attention to trade secrecy and its relationship with patent protection under Australian law. Interestingly, another recently completed report on intellectual property arrangements by Australia’s Productivity Commission included no consideration of trade secrecy law, a major oversight under the circumstances of modern genomic research. Policy and doctrinal analysis of Australia’s trade secrecy regime is virtually non-existent. This paper seeks to address the challenge of whether trade secrecy can provide adequate protection to genomics researchers and clinicians, and at the same time allow a culture of openness to flourish. In doing so, it considers how it might be possible to ‘evolve’ the law of trade secrecy to adapt to a changing research and clinical environment.

**About Jane Nielsen**

Jane has been a Senior Lecturer at the Law School, University of Tasmania since 2007. She is a member of the Centre for Law and Genetics (CLG) based at the University of Tasmania, and her research interests align with the strategic goals of the CLG. Her research focuses on intellectual property, competition law and technological development, in particular the role of patent law and its impact in areas of emerging technology. Her recent work has examined the role of materials and data exchange in biomedical research, and the ways in which patents impact on the provision of genetic diagnostic testing. Jane has also recently conducted research considering the issues that arise in relation to intellectual property and consumer law in the field of 3D printing. Jane is an associate investigator with the Ethics, Public Policy and Engagement theme of the ARC Australian Centre of Excellence for Electromaterials Science.
Rapid technological advancements constantly challenge and reflect the object and purpose of intellectual property law. Biotechnological inventions involving the patenting of life forms challenged the traditional view that patent law does not, to a great extent, concern itself with living material. Innovation in biotechnology, however, as a major driver for maintaining and enhancing human life and health has been pushing the boundaries of patentability.

At the same time, the underlying complexities and concerns over bioethics raise questions regarding the scope of such patents. Considerations such as ordre public, morality and humanitarian concerns serve as a balancing tool in determining the patentability of biotechnological inventions for better healthcare and justifying the limitations to patentability.

However, biofabrication via 3D printing offering hopes of the availability of bioprinted human organs once again demonstrates the changing face of intellectual property and innovation. Breakthroughs overcoming the challenges in tissue engineering have allowed platforms for new living 3D bioprinted tissues to be developed. While recent patents have been granted for claims involving 3D engineered living tissues and organs, controversial issues arise. This paper proposes to examine the implications for biofabrication technologies involving the patentability of human tissues and organs, and related issues on their patentability as ‘methods of medical treatment’.

The authors focus on a cross jurisdictional overview of the patent system and examine the implications arising from the controversy over the patentability of genes and genetic material. The patentability of the DNA isolated from the human body was debated in different legislative regimes over concerns on the blurring of the distinction between ‘discoveries’ or ‘laws of nature’ and ‘inventions’. An isolated DNA ‘alters neither [the] fundamental quality of DNA as it exists in the body nor the information it encodes’ despite the need for human intervention to create them. In terms of biofabrication processes and products, a bioprinted kidney from human samples has the same biological components, which are already in existence in nature. It thus raises the same query. Are human tissues or organs created by the bioprinting and multi-layering of naturally occurring cells in a laboratory a man-made invention or a non-patentable product of nature?
The authors further explore the ‘medical treatment exception’ in the international context in interpreting the role of intellectual property in this area. The New Zealand patent regime provides for an explicit medical treatment exclusion, which mirrors that of the United Kingdom. In contrast, legislative silence under the Australian Patents Act has allowed a number of approaches for either in vitro or in vivo growth of cells via biofabrication processes in 3D printing. This breakthrough achieved in the absence of a medical treatment exclusion provides a focus to consider its effect in the 3D bioprinting of human organs and tissues for access to innovation and changing technologies.

About Pheh Hoon Lim

Pheh Hoon Lim is a Senior Lecturer in the Law School, Auckland University of Technology. Her main research interests are in copyright and patent law, comparing the legislative initiatives across jurisdictions. She has presented at conferences in the United Kingdom, Europe, Australia and New Zealand and published articles in the New Zealand Business Law Quarterly and overseas journals such as the International Review of Intellectual Property and Competition Law, European Intellectual Property Review and the Intellectual Property Quarterly. Her research in copyright law critiques the vexed issue of the idea-expression dichotomy (particularly with reference to the development of the law on the copyrightability of computer software). More recently, her research has focused on software licensing and exhaustion of rights in digital goods as well as patent law. Her interest in the patent area surveys the state of intellectual property law, particularly for pharmaceuticals and the need for access to essential medicines in the developing world.
Thinking beyond the TRIPS Agreement about Reshaping the Patent Term

Milton Lucídio Leão Barcellos, Antonio Meneghetti Law School and Leão Intellectual Property, Brazil

The 20 years patent term is widely disseminated as accomplishing specific goals of the patent system. The international harmonization of the patent term through the TRIPS Agreement definitely made it easier to globally predict and calculate investments in solutions or products with corresponding inventions protected by patents, between other benefits.

Review if the 20 years patent term dully fulfill the purpose of the patent system in different technology fields it is relevant in order to search for the ideal patent term in a constantly changing technological and complex world. How the patent term does impacts different technologies and markets? Should the patent term be shorter than 20 years?

How specialists and authorities in competition law and intellectual property rights think about a reduction or reshaping of the patent term? Those are the questions that we will deeply think about and try to answer through this specific and limited study.

About Milton Lucídio Leão Barcellos

Milton Lucídio is a Professor of Intellectual Property Law, Antonio Meneghetti Law School. Invited University Professor in Post-Graduation Law Programs in several Brazilian Universities and Institutions in the field of Intellectual Property, competition and innovation, such as PUCRS, UNISINOS, UFRGS, FSG, ESA/OABRS, between other Post-Graduation programs. Lawyer, Patent Attorney and Partner at Leão Intellectual Property Firm. Doctor of Law (PhD) from Pontifícia Universidade Católica do Rio Grande do Sul (PUCRS) with a CAPES scholarship and a period as Visiting Professor at the Boston University Law School (2009) with a thesis in the field of Patents and Competition Law with unanimous approval Summa Cum Laude (2010). Master's Degree
in Law from Pontifícia Universidade Católica do Rio Grande do Sul (PUCRS) with a CAPES scholarship and dissertation in the field of industrial property and constitutional hermeneutics (2006).

Expertise, Efficiency, Equity – searching for an appropriate degree of bifurcation of patent infringement and validity

Christoph Rademacher, Waseda University School of Law, Tokyo

Patentees usually have a legitimate interest in a speedy and efficient enforcement of infringed patents, often with the objective to reestablish the statutory monopoly conferred by the grant of a patent. Technology users and implementers also have a legitimate interest to defend themselves against assertions of patent infringement and the threat of market exclusion at a level playing field on which they can properly assess the claims made by a patentee, prepare counter-arguments, and, if reasonable, challenge the validity of asserted patents.

A review of the recent international patent litigation landscape suggests that the institutional setup is one of the key factors for patent enforcement, and that the “right” degree of bifurcating patent infringement and validity determination is of crucial importance for the prospects of patentees and alleged infringers. This paper will review the legal basis and practical implications of bifurcating infringement and validity determination in the US, Germany and Japan – three major patent jurisdictions with very different institutional structures and authorities. Germany has maintained the strictest form of bifurcating infringement and validity proceedings amongst major patent law jurisdictions, and has largely avoided substantive discussions on the appropriateness of its setup.

The US has introduced the Patent Trial and Appeal Board (PTAB) as a new institution entrusted with reviewing the validity of challenged patents in the course of implementing the America Invents Act of 2011. The PTAB’s immense impact on US and indirectly also on global patent litigation is possibly the strongest showcase for the significant relevance that the bifurcation of infringement and validity can have.

Finally, Japan is the jurisdiction with the longest tradition of patent protection and enforcement in Asia. Japan has traditionally applied a German-influenced principle of bifurcation of infringement and validity. This principle was abolished by the Japanese Supreme Court’s Kilby decision a little more than 15 years ago; the sudden disappearance of bifurcating infringement and validity and its substantial impact on Japanese patent litigation presents another important set of insights when assessing the role of bifurcation in patent law.

After providing a review and analysis of the three aforementioned jurisdictions, the paper will propose...
a set of institutional responsibilities that could strike a fair balance between patentees and alleged infringers. In doing so, it will highlight the role of other procedural aspects that have impacted patent enforcement procedure in the past and that should not be ignored when assessing bifurcation.

**About Christoph Rademacher**

Christoph Rademacher has been appointed as associate professor for international business and IP law at Waseda University School of Law in Tokyo in 2014. In addition, he is an off-counsel at the Tokyo office of Baker & McKenzie.

Prof. Rademacher is the first foreigner who has been appointed as a tenured law professor at Waseda, where he teaches a number of courses at graduate and undergraduate level in the field of business and IP law, both in Japanese and English. His research focuses on the protection of technical innovation by means of patents and other rights; he is a member of the directorate of the Waseda University Research Center of the Legal System of Intellectual Property (RCLIP), a regular speaker at IP conferences in Asia, Europe or the US and, amongst others, a co-author of the treatise “Patent Enforcement in the US, Germany and Japan” (Oxford University Press, 2015), and a co-editor of the Japanese interdisciplinary volume “The Legal System of Design Protection: Current Situation and Issues through the Perspective of Jurists and Designers” (Nippon Hyoron Sha, 2016). Since June 2017, he is serving as editor-in-chief of the bimonthly journal Patents & Licensing: Journal on Japanese IP Law (published in English).

Prof. Rademacher is admitted as an attorney-at-law in New York and as a solicitor in the Republic of Ireland. He has obtained his first degree in business and law as well as his doctorate degree in law at the University of Siegen, Germany, and a LLM degree at Stanford Law School.
Searching for Optimal Response to PAEs’ Excessive Enforcement Practices

Rafal Sikorski, Adam Mickiewicz University, Poznań, Poland

Excessive patent enforcement by patent assertion entities (PAEs) has become a widely-discussed issue around the world. PAEs assert their patents and threaten patent implementers with injunctive relief only to demand royalties which exceed the value of patent protected inventions. Certainly, objectives of patent law, namely to encourage investment in innovation, can be satisfied, with the rewards being reasonable rather than excessive.

PAEs are generally portrayed in negative terms. In most cases, PAEs neither practice their patents nor are they active on product markets. PAEs are rarely involved in research and development of new technologies. Their business model concentrates on acquiring patent portfolios to assert patents against patent implementers. Frequently, PAEs search for patents that are essential to the practice of technological standards. Thus, typically PAEs will be interested in exploiting their patent portfolios to maximize profits through licensing.

PAEs are not a homogeneous group of patent holders however. Some PAEs, referred to as privateers might be interested in exclusion of third party implementers from product markets, either by denying a license or by making excessive royalty demands. Such PAEs, might be employed by patent holders who operate on product markets and are interested in excluding their competitors from market access. Other PAEs, though non-practicing entities themselves, are involved in extensive R&D activities though their operations are limited to licensing on technology markets.

Assessing whether enforcement is excessive and what should be the right response of IP laws is certainly a challenge. The purpose of the paper would be address various ways of responding to PAEs phenomena. The author would seek answers to the questions stated bellow.

Should such a response come from substantive patent law? Does a bifurcated patent system, where infringement and validity issues are decided separately, generate excessive litigation? May the response come through competition laws? Could the problem be solved by resorting to more general defenses available in private (civil) laws which refer to economic purpose for which the rights (patents) are granted, or maybe the response should come through properly structuring the remedies in patent law?
The author believes the PAEs excessive litigation strategies should primarily be addressed through flexible structuring of patent remedies, preferably within the patent law itself. The author would like to assess whether such a solution is acceptable considering international instruments such as TRIPS (the likely answer is affirmative) and further whether TRIPS requires that remedies are structured in a flexible manner.

On the one hand, TRIPS provisions were adopted prior to large scale excessive enforcement practices of PAEs, on the other however numerous TRIPS provisions demand for example that remedies are fair and equitable and that safeguards against their abuse are implemented.

About Rafal Sikorski

At the firm, Rafal Sikorski manages the Intellectual Property Department, advising Clients on IP disputes and transactions, industrial property law, combating unfair competition and the intricacies of competition law.

He also provides legal counsel on large IT projects, drawing up agreements on computer software distribution, and leads negotiations with entities managing patent pools and patents enabling the use of standards leading to beneficial licence agreements, made according to the Client’s needs. On a number of occasions he has represented the firm’s Clients in disputes on the infringement of industrial property rights, and in matters of copyright law.

Mr. Sikorski graduated from the Faculty of Law and Administration of Adam Mickiewicz University in Poznań in 1999. In 2000, he received the title of LL.M. in International Business Transactions from the Central European University in Budapest. Since 2005 he has held a Ph.D. in legal science awarded by the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, where he currently works as an assistant professor at the Chair of European Law. He has also been a scholar at the TMC Asser Institute in the Hague.

His scientific accomplishments include a number of publications on copyright law, industrial property law, unfair competition law, competition law and private international law. He is currently co-editing a series entitled ‘An Outline of Intellectual Property Law’ (Zarys Prawa Własności Intelektualnej), published by Wydawnictwo C.H. Beck.

Within his scientific work he mainly focuses on relations between competition law and intellectual property law, with a particular emphasis on standardization and patent pools. Additionally, Mr. Sikorski deals with issues in determining the governing law for intellectual property law contracts and infringements of such.
Session 7A

Contouring Copyright Purposively

GBLT1
Session 7A Chair
Silke von Lewinski, Max Planck Institute for Innovation and Competition, Germany

Silke von Lewinski is tenured at the Max Planck Institute for Innovation and Competition, Munich and specialises in international and European copyright law. Adj. Prof., Franklin Pierce Center for IP at Univ. of New Hampshire, Concord, USA; Ass. Prof., Zagreb University.

Prof. von Lewinski frequently has been an expert consulting the European Commission, eg on the EC Rental Rights Directive (drafting of EC proposal with explanatory memorandum and steering it through legislative process), and regarding the WIPO Diplomatic Conference 1996 (preparation, and member of the EC delegation). At the WIPO Diplomatic Conferences 2000 and 2012 (resulting in the Beijing Treaty) and 2013 (resulting in the Marrakesh Treaty), she was a delegate (2012 and 2013: Deputy Head of Delegation) for Germany. She has been the chief legal expert consulting the governments of Eastern and Central European and former Soviet countries on their copyright legislation in the framework of the EC’s TA programs from 1995.

Book publications include: “The WIPO Treaties on Copyright” (with Reinbothe, 2nd edn OUP 2015); “International Copyright Law and Policy” (OUP, 2008); “European Copyright Law” (with Walter et al., OUP, 2010); editor of “Indigenous Heritage and Intellectual Property” (Kluwer, 2nd edn. 2008), and “Copyright throughout the World” (West, from 2008), et al.

Frequent visiting professorships worldwide (eg, Paris XI; Toulouse 1; Univ. Laval, Québec; Univ. Melbourne). First Walter Minton Visiting Scholar at Columbia University School of Law, New York (1998); the First Distinguished Visitor to the IP Research Institute of Australia (IPRIA, 2002); and The Hosier Distinguished Visiting IP Scholar, DePaul University, Chicago, 2005.

Vice President ALAI; President, ALAI Germany; member, Editorial Board (Journal of the Copyright Society of the USA; Cahiers de la propriété intellectuelle); Administrative Council, VG Wort.
> United in Diversity or Divided in Unity? – In Search of a Lost Object of Copyright Protection

_Ewa Laskowska, Faculty of Law, Jagiellonian University, Kraków, Poland_

Paraphrasing Marcel Proust, a new dispute about copyright should consist not in seeking new landscapes, but in having new eyes. In order to verify his paraphrased thesis I would like to propose a paper about a copyright’s subject matter and object of its protection: work. My proposal is built in three acts: (1) paradise lost, or review on international provisions and copyright’s goals, (2) back to the future, or the impact of fast-changing technologies and (3) a new hope, or an answer to a question about united definition of work. The scenography will be made of international law and fast-changing technology.

The main hypothesis consists on daily discrepancies that we see teaching copyright law: differences between what shall be protected, is protected, but not what should be protected. The 21th century has led us not only to several meaningful changes in copyright’s perspective, but also it has brought as to a conceptual breaking point where previously common institutions are no longer able to reflect copyright’s functions: no control over circulation of a copy in the Internet provoke question about the exclusivity principle, at the same time minimal threshold of originality is still lowered down, not mentioning the newest technologies, such as blockchain or big data revolution, that ask for extension of protection over an information. Shall we not ask where in this chaotic and rapidly changing landscape a main character of copyright’s scene: work is to be found?

The starting point (1) will be an introduction to research on paradise lost in copyright. In this part I ask how the constitutionally introduced goals of copyright are implemented and fulfilled on statutory level and in judicial practice, on the example of the US and EU law (in regard to continental dualistic and monistic systems of EU Member States). The goal is to provide differences and parallels between common and continental law and to verify how the subject matter of copyright (work) is defined and protected. Then, the results will be compared with the international law (TRIPS and the Berne), also considering the evolution that the copyright’s purposes and its object of protection have experienced from the very beginning. The review ends with a summary and answers the first two basic questions: what shall be protected (copyright’s purposes) and what is actually protected (definition of work at statutory level and in judicial
practice). The second part (2) backs to the future and investigates new technologies: big data, blockchain technology and development of the Internet and social media. In this part I would like to present results of research conducted in IT environment regarding the actual needs of protection (above all: information). The last act (3) should bring a new hope, since it includes final results of the research, questions for the future and a modest proposal how to (re)build copyright in order to restore balance and to achieve constitutionally and internationally granted purposes of this system.

**About Ewa Laskowska**

Ewa Laskowska graduated from the Jagiellonian University in Krakow (Faculty of Law, Intellectual Property Law Institute, supervised by prof. dr hab. Ryszard Markiewicz) and Ruprecht-Karls-Universität in Heidelberg in Germany (LL.M. postgraduate studies at the Faculty of Law, German and European Trade and Corporate Law, supervised by Prof. Dr. Dr. h.c. mult. Peter-Christian Müller-Graff). She was also an active participant in ATRIP Congress 2016 and the Trialog Seminar, an international workshop, between universities in Germany (Heidelberg, Mainz), Poland (Jagiellonian University) and Ukraine (Mohyla Akademie in Kiev). In her interests are copyright law, European law and the impact of modern technologies on intellectual property law.

Her doctoral thesis related to the problem of copyright protection against the background of the Europeanization process, later published and awarded in the competition organized by the Polish Patent Office for the best doctoral thesis on intellectual property in 2015. She is also author of scientific papers in regard to the German law, harmonization of the intellectual property law and copyright law. She speaks fluently in both English and German.
Access to Education Vis-à-vis Protection of Copyright: Indian Copyright Jurisprudence

Vandana Singh, School of Law and Legal Studies, Guru Gobind Singh Indraprashta University, New Delhi, India

Recently in India the Delhi High Court in the case of Oxford University Press & Ors v. Rameshwari photocopy, in which the group of publishers alleged infringement of copyright for making Course Pack by University photocopier shop. It was alleged by the publisher that the exception of fair use for educational purpose mentioned under section 52 of Indian Copyright Act does not cover photocopying of entire book and its distribution. The Delhi High Court rejecting the contention of publishers held that there was no actionable infringement in this case. All the alleged copying is covered under the broad educational exception under section 52(1)(i) of the copyright act. In short, the judge noted that there was no need for trial at all in this matter, since there was no actionable infringement. The judge explicitly stated that the educational exception under section 52(1) (i) should be construed widely and clearly covers the present set of acts engaged in by DU (photocopying excerpts of books etc and creating course packs). Plaintiff's argument that it should cover only photocopying in the classroom is incorrect. The exception should cover all kinds of educational copying including copying for the purpose of preparatory work towards a class etc. The High Court further held that “Copyright specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.” In the appeal the Division bench of Delhi High Court held that photocopying of copyrighted material for education use was allowed under the Indian Copyright law, and there could be no restriction on how much of the book is copied, as long as the demands of the course being taught justified the copying. Setting aside the order of Single bench and remanding the matter for trial the court held that “We declare that the law in India would not warrant an approach to answer the question by looking at whether the course pack has become a textbook, but by considering whether the inclusion of the copyrighted work in the course pack was justified by the purpose of the course pack, that is, for instructional use by the teacher to the class and this would warrant an analysis of the course pack with reference to the objective of the course, the course
content and the list of suggested readings given by the teacher to the students. This would require expert evidence.”

This decision will prove one of the biggest landmarks in IP jurisprudence the world over. And clearly spells out that private rights will have to yield to larger social goals which have to be interpreted widely. Much like the Supreme Court decision in the Novartis case, this decision too makes it amply clear that while India will be guided by foreign precedent, it will carve out its own IP jurisprudence and interpret the law in a way that suits its own societal requirements. There is no doubt that the legislature wanted to balance copyright with the public interest in ensuring access and the judgment sees the ‘no infringement’ clauses as being consistent with articles in the Berne Convention and the TRIPS, which provide for domestic legislation to permit reproduction for specific purposes, as long as they do not conflict with normal exploitation of the works or unreasonably prejudice the right holder. The verdict may justly raise the concern whether conferring unrestricted reprographic rights on academic institutions will drive reputed publishers out of the field of education. It is true that academic publications, especially international ones, are expensive, putting them beyond the reach of many students. But the question is whether the balance between the competing interests has been fully preserved in the law. The research paper proposes to analyse the recent judgment in the light of practices in different economy and will try to propose harmonious construction between conflicting interests in the field of Copyright.

About Vandana Singh

Dr. Vandana Singh, Assistant Professor of Law, USLLS, Guru Gobind Singh Indraprastha University, Delhi, India holds degree of B.Sc, LL.B, LL.M and Doctoral degree from the University of Delhi, Delhi India, and is working as an assistant professor of Law at the USLLS, Guru Gobind Singh Indraprastha University, Delhi, India. Her areas of specialization are intellectual Property Rights, Alternative Dispute Resolution, Private International Law and Consumer Law. She has co-authored the book ‘Case Laws on Medical Negligence: Consumer Case Laws’, Department of Consumer Affairs, Government of India, in association with IIPA. Her research papers have been published in leading international journals. She has co-authored three monographs on private international law, insurance law and economic law, for the International Encyclopedia of Laws, published by Wolters Kluwer, Law and Business, Netherland. She has also contributed a chapter in the Toshiyuki Kono (ed.), Intellectual Property and Private International Law: Comparative Perspectives (Hart Publication, Oxford 2012) and a chapter in the Private International Law: South Asian States’ Practice (Springer, 2016).

In USLLS, she is convener of Legal Aid Centre and actively involved in community outreach programme, legal awareness camp, mass legal literacy event for school children etc. Her recent publication is an authored book Law of Geographical Indications in India: Rising Above Horizon, published by Eastern Law House (2017).
Copyright as an Access Right: Rethinking Copyright Law as a Vehicle for Cultural Participation and Social Progress

Christophe Geiger, Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg, France

Copyright, originally conceived as a tool to protect the author and to provide incentives to create for the benefit of society, is nowadays more and more perceived as a mechanism to the advantage of “large, impersonal and unlovable corporations”. The inherent social dimension of copyright law has progressively been lost of sight by policy makers to the benefit of individualistic, even egotistic conceptions. In the recent discourse on the strengthening of legal means of protection, copyright is more frequently presented as an investment-protection mechanism than a vehicle of cultural participation and social progress. In this context, the society’s enrichment and future creativity are often portrayed in the rhetoric of the major economic players only as “a fortunate by-product of private entitlement”. This has provoked some important counter-reactions: as copyright is perceived mainly as a right to forbid, to sanction and punish, infringing copyright has sometimes evolved among younger generations to an act of protest, leading to a serious crisis of legitimacy. Even among creators, copyright is increasingly perceived as a hurdle in the creative process, as the success of so-called “open content” models clearly demonstrates.

These developments urgently attest the need to rethink copyright in order to adapt its rules to its initially dual character: 1) of a right to secure and organize cultural participation and access to creative works (access aspect); and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works (protection aspect). Avoiding the privatisation of information by copyright law and assuring that cultural goods are still available for future innovations might mean rethinking copyright as a right to access rather than a right to forbid, thereby emphasizing the inclusive rather than the exclusive nature of copyright protection.

This paper will first examine the philosophical and ethical rationales underlying the often neglected nature of copyright as an “access right” before turning to the consequences of such an understanding for the shape and use of copyright law.
About Christophe Geiger

Christophe Geiger is Professor of Law, Director General and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg (France). In addition, he is an affiliated senior researcher at the Max Planck Institute for Innovation and Competition in Munich (Germany), as well as Spangenberg Fellow at the Spangenberg Center for Law, Technology & the Arts, Case Western Reserve University School of Law in Cleveland (US).

He specializes in national, European, international and comparative intellectual property (IP) law, acts as external expert for the European Parliament and the European Union Intellectual Property Office (EUIPO), has drafted reports on IP for the European and international institutions and taught as visiting professor in several universities, his latest appointment being Global Hauser Visiting Professor at the New York University (NYU) School of Law in spring 2017. He is also General Editor of the Collection of the CEIPI published by LexisNexis, co-editor of the EIPIN series published by Edward Elgar, co-editor of the CEIPI-ICTSD Publication Series on “Global Perspectives and Challenges for the Intellectual Property System” and member of the editorial board of several journals on IP law.

Copyright Scope and Copyright Misuse

Ann Bartow, Franklin Pierce Center for Intellectual Property, School of Law, University of New Hampshire, US

This paper will describe and internationally map the ways that the scope of a copyright is described; the levels of protection that copyrights receive, and what effect the former has upon the latter. When infringement claims based on allegations of “substantial similarity” and “unauthorized derivative work” are raised, a fact finder needs a clear conception of what a plaintiff copyright is comprised of to make a fair determination of whether too much copyright-covered material has been misappropriated. The copyright holder will assert the broadest possible scope of protection. Over claiming copyright scope is an unfair tactic that far too many copyright holders engage in, often quite successfully.

The paper will further interrogate the doctrine of copyright misuse, under which a court can refuse to find liability for acts of putative copyright infringement because the copyright holder is attempting to leverage or extend the scope of a copyright improperly. It will look at the frequency with which copyright misuse (or a corollary doctrine) is alleged by defendants in copyright infringement suits; the range of factual situations under which copyright misuse allegations occur; how often the doctrine is linked to other legal constructs such as antitrust or competition law; and under which circumstances this (typically) affirmative defense is most and least likely to be successful. Though primarily descriptive in nature the paper will conclude with normative proposals for regulating copyright scope for litigation purposes, which if workable would also have resonance in the contexts of licensing and calculating infringement damages.
About Ann Bartow

Ann Bartow joined UNH Law to lead the Franklin Pierce Center for Intellectual Property in 2015. She joined the Pace Law School faculty in 2011 from the University of South Carolina School of Law. During the 2011-2012 academic year, Professor Bartow was a Fulbright Scholar at Tongji University in Shanghai, China. She teaches Copyright Law, Trademark Law, Survey of Intellectual Property Law, Art Law and Torts. She is a graduate of Cornell University and the University of Pennsylvania Law School. Her scholarship focuses on the intersection between intellectual property laws and public policy concerns, privacy and technology law, and feminist legal theory, and she has published numerous articles and book chapters on these subjects.

Professor Bartow is the past chair and a current member of the American Association of Law Schools Executive Committee of the Defamation and Privacy Section. She is also a member of the Advisory Board of the Electronic Privacy Information Center (EPIC). Professor Bartow is a member of the American Law Institute.

Prior to entering the academy in 1995, Professor Bartow practiced law at McCutchen, Doyle, Brown & Enersen (now known as Bingham McCutchen LLP) in San Francisco. She began her teaching career as an Honorable Abraham L. Freedman Teaching Fellow at Temple University School of Law, where she also received an LL.M. in Legal Education and later served as a visiting professor here. Professor Bartow also has taught as a visitor at American University Washington College of Law, the University of Dayton School of Law and the University of Idaho College of Law.
Collective Management Systems Vis-À-Vis Competition Law and Policy, the European Response

Valeria Falce, Professor of Law, European University of Rome, Italy
Maria Letizia Bixio, Post Doc Researcher, European University of Rome, Italy

Whereas the collective management of copyright and related rights is questioned in its foundations as an economic, cultural and social “asset” for ensuring a proper remuneration to authors and artists, the implementation of directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market will force national borders, opening the markets to competition in a transnational environment.

In the light of the legal and economic struggles accompanying the implementing process, in the following notes we will first focus on the different models shaping the collective management practices, ranging from mere representation structures of groups of authors to public bodies responsible, from commercial companies to actual consortia. Then we will verify whether and to which extent the different structures and legal systems cope with competition law both under an economic and social viewpoint, coming to the conclusion that the transposition of the Directive shall be guided by a more balanced approach, in line with the Service Directive.

About Valeria Falce

Full Professor of Intellectual Property and Competition Law, PhD Coordinator and Deputy Rector for Post lauream activities at the European University of Rome, Valeria is non-Governmental Advisor for the ICN (International Competition network) and executive Member of the Academic Society for Competition Law (ASCOLA).

Founding Member of the Italian Academy of the Internet Code and Director of the Italian Research Center on Copyright, Information and Innovation (CREDA), in 2015 has been appointed by the Italian Ministry of Economic Development as one of the five Members of the Board of Appeals against the decisions of the Italian Office for Patents and Trademarks while in 2007 Valeria has been appointed by the Italian Ministry of Cultural Heritage as Independent Expert of the Commission for the Reform of Copyright. Member of the Focus Group of Mapping, a Scientific Project on Internet Governance, Privacy and Intellectual Property, sponsored by the European
Commission, Valeria has contributed as Advisor to the Study on Trade Secret and Confidential Information, sponsored by the European Commission in 2012, and as Expert to the Study on Copyright, Development and Competition, sponsored by the OECD in 2013.

Valeria holds a PhD in Competition Law from the University of Perugia, together with Bocconi University and LUISS Guido Carli University, and an LLM (with merits) in Intellectual Property from the London School of Economics. Admitted to the Italian Bar in 1999.

Visiting Professor at the Centre for European Studies, King’s College London, in the Dickson Poon School of Law from 2016, and before at the Schuman Centre for Advanced Studies, European University Institute (2013-2015), Valeria has been Fellow at the University of Cambridge, Columbia University School of Law and New York University Law Centre. Valeria teaches Competition Law and Regulation; Intellectual Property and Copyright in the Digital Age. Her research focuses on Regulation, Competition, Intellectual Property and Copyright in the Digital Age.

About Maria Letizia Bixio

Graduated from “Università di Roma La Sapienza”, she obtained a Ph.D. in Copyright Law from University “Parthenope” of Naples; is now Postdoctoral Researcher at the European University of Rome and contributor for the chair of Commercial Law. She is lecturer of Cultural Heritage Rights at the European University of Rome. She is advisor of the selected commission for the droit de suite and Independent Expert, appointed by the Italian Minister of Culture for the commission for the study on directive 26/2014. She is a member of the Rome Bar Association since 2013. Member of CREDA - Innovation & Copyright Excellence Research Centre, European University of Rome and member of ALAI - Association littéraire et artistique Internationale. Editorial staff member of the Italian Review “Diritto Mercato e Tecnologia”.
Session 7B

Patents Objective(s)

GBLT2
Session 7B Chair

Daniel Gervais, Vanderbilt Law School, USA

Daniel Gervais focuses on international intellectual property law, having spent 10 years researching and addressing policy issues as a legal officer at the World Trade Organization (WTO), as head of the Copyright Projects section of the WIPO, and Deputy Secretary General of International Confederation of Societies of Authors and Composers (CISAC), and Vice-Chair of the International Federation of Reproduction Rights Organizations (IFRRO). He is the author of The TRIPS Agreement: Drafting History and Analysis, a leading guide to the text that governs international intellectual property rights. Before joining Vanderbilt Law School in 2008, Professor Gervais served as acting dean and vice-dean for research of the Common Law Section at the University of Ottawa. Before entering the academy, he practiced law as a partner with the technology law firm BCF in Montreal. He was also a consultant with the Paris-based Organization for Economic Cooperation and Development (OECD). He has been a visiting professor at numerous international universities and a visiting scholar at Stanford Law School. In 2012, he was the Gide Loyrette Nouel Visiting Chair at Sciences Po Law School in Paris. He is editor-in-chief of the peer-reviewed Journal of World Intellectual Property. In 2012, he was the first North American law professor admitted to the Academy of Europe. In 2017 he became Chairman of the International Association for the Advancement of Teaching And Research in Intellectual Property (ATRIP). He is a member of the American Law Institute.
Data exclusivity as an instrument of legal protection of pharmaceuticals

Zaneta Pacud, The Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland

Data exclusivity is nowadays an important element – next to patents and supplementary protection certificates – of the entire body of legal protection for innovative medicinal products. Since it is perceived as complementary to the remaining two regimes its significance in the legal protection of medicinal products is assessed usually in connection to patents and SPC. Data exclusivity is however an interesting example of a legal instrument which remains beyond the realm of intellectual property rights but fulfils a function convergent with the latter. As such it is worth of deeper analysis.

The paper aims at describing the purpose and object of data exclusivity as an sui generis instrument of legal protection for pharmaceuticals. The respective analysis is conducted on the ground of the legislation of the European Union and with a view to compare this instrument with patents and SPC.

As far as the purpose is concerned it is examined what were the reasons for introduction of data exclusivity for various types of medicines and whether the reasons are still valid. It is also analysed what differs the rationale of data exclusivity from the purposes of patent and SPC protection.

As regards the object of data exclusivity, the analysis refers first to the premises of protective ability and then it involves the extent of protection as well as its territorial and temporal scope. Further, it concerns the enforcement of rights and lastly takes into account the legal structure of the system, pointing out to issues of exclusions from protection and exemptions to owners’ rights. The analysis concludes with a general reflections on advantages and disadvantages of data exclusivity in the context of its consequences for the various groups of stakeholders: both generic and innovative industries as well as public health.

In the era of - on the one hand - hypertrophy and trivialisation of patents and - on the other - of much uncertainty and criticism about SPC, this paper eventually considers a question whether the data exclusivity mechanism may be seen as an instrument
that is better tailored to fulfil the assumptions of legal protection for pharmaceuticals than patents and SPC themselves.

The paper is written specifically with reference to the legislation of European Union, but nevertheless it encompasses many reflections on data exclusivity of a universal nature.

About Żaneta Pacud

Żaneta Pacud graduated in law and European studies at Adam Mickiewicz University in Poznan. She obtained her PhD in 2012 at the Jagiellonian University in Cracow. For her dissertation, devoted to patent protection of medicinal products, she was awarded by Ministry of Science and Higher Education in the contest for the best doctoral thesis in the field of intellectual property. She coordinated an international research project “Innovation Expert System” at the Chair of Intellectual Property of the Jagiellonian University and was lecturer there. Recently she has held a scholarship at the Max-Planck-Institute for Innovation and Competition in Munich. She is a post-doctoral researcher at the Institute of Law Studies at the Polish Academy of Sciences in Warsaw. Her interests focus on industrial property, especially on patent law and life science. Currently she conducts studies on non-patent protection for pharmaceuticals and participates in a research project devoted to biotechnological inventions in the context of fundamental rights. She is a practising attorney-at-law.
Patent Invalidation and Legal Certainty

Christoph Ann, Technical University of Munich, TUM School of Management

In Germany, an increasing number of patents are struck down in nullity proceedings. As a result, two German studies suggested that in the light of high success rates, a respective percentage of patents granted had to be considered latently invalid, in some areas more than 70%.

Was this true, it would be disquieting for right holders and the system at large, because infringers then could disrespect patents and gamble to sue them out of their ways, should they ever be sued for infringement.

Two questions need to be answered: Firstly, how valid are patents issued by the world’s leading PTOs? Secondly, how much legal certainty can patent holders expect from a patent?

In Germany, it seems that the balance right now is being struck too far in disfavor of patent holders. Because, if SME-applicants, especially start-ups, cannot rely upon granted patents: why should they seek costly patent protection in the first place? And whose interests are being served, if we deny patent holders said legal certainty?

About Professor Christoph Ann

Professor Christoph Ann holds the chair of Corporate and IP Law (www.jura.wi.tum.de) at Technical University of Munich (TUM), School of Management. While TUM has been among Germany’s top three ranked universities for quite some time, renowned “Handelsblatt” in 2012 and 2014 ranked TUM School of Management Germany’s #1 Research Business School. In 2017, TUM School of Management obtained the so called “Triple Crown”, its accreditation by all major European and U.S. accreditation bodies.

Prof. Ann earned his law degrees in both, Germany and the U.S. (LL.M., Duke ’88). Before coming to Munich, he practiced law as an attorney in Munich and Erlangen and from 2000-2003 taught IP law as a full Professor of Law at Freiburg University’s Faculty of Law, then Germany’s #1 law school.

From 2001-2003, he also served as a judge on the Mannheim Regional Court’s renowned IP Infringement Panel with jurisdiction over the technologically eminent German state of Baden-Württemberg. In Munich, Prof. Ann teaches IP Law at TUM and the Munich Intellectual Property Law Center (MIPLC). At MIPLC, he also serves on the Managing Board.
On a regular basis, Prof. Ann teaches at law school abroad; he has done so in the U.S. at GWU (Washington D.C.), UWash (Seattle), Duke Univ. (Durham, NC), Stetson University, College of Law (St. Petersburg, FL), UOregon (Eugene, OR), in Australia at La Trobe Univ. (Melbourne), Univ of Queensland (Brisbane), in France at IHEE and Université Robert Schuman (both Strasbourg), in Japan at Keio Univ. (Tokyo) and in Hungary at Andrássy University (Budapest).

Prof. Ann’s interests focus on the European and International Law of Technology Protection (Patents & Trade Secrets) including Licensing and Competition Law, including the respective business environments (IP strategy and IP management). His publications include six books and more than 150 contributions to books and journals. His new edition of the German speaking world’s leading treatise on Patent law (Patentrecht, >1,100 pp.) has appeared in Feb. 2016.

Prof. Ann is a listed Neutral with the WIPO Arbitration and Mediation Center, chairman of the Nuremberg Chamber of Commerce’s Standing Court of Commercial Arbitration and has served as an arbitrator for ICC, UNCITRAL, and the German Arbitration Institution (DIS). For entities from Britain as well as from the U.S., he has frequently served as an expert for German and European Patent Law and Patent Licensing Agreements.
Stating the Obvious or just seeking Clarity? A comparative analysis of objects and purposes clauses in key patent jurisdictions

Natalie P Stoianoff, Faculty of Law, University of Technology, Sydney, Australia

In July of 2013, the federal administrative body, IP Australia, issued a consultation paper on the question of whether the Australian patents legislation needed an objects clause to ‘set out the underlying purpose of [that] piece of legislation’.¹

That paper also considered the introduction of a general exclusion clause. Such an objects clause has yet to be incorporated in Australian patent legislation, however, in the more recent Productivity Commission Final Report on Intellectual Property Arrangements (Dec 2016) the need for an objects clause was recommended despite several submissions having argued against the idea.² Of those submissions to the enquiry that indicated an objects clause would be favourable, there was a preference that such a clause be drafted as closely as possible to Article 7 of the TRIPS Agreement. The question remains, if patent legislation is compliant with the TRIPS Agreement, is it necessary to restate such objectives or not and, if so, should there be something more?

This paper addresses the need for explicit objects clauses in patent legislation by conducting a comparative analysis of objects and purposes clauses in key patent jurisdictions including identifying and considering those jurisdictions where an objects clause is not included in the legislation. In carrying out this comparative analysis the paper will investigate both the benefits and detriments to having an objects clause.

About Natalie P. Stoianoff

Natalie Stoianoff is a Professor in the Faculty of Law at the University of Technology Sydney, and the Director of the Intellectual Property Program which comprises a suite of 4 postgraduate degrees.

Her research is interdisciplinary, concerned with the legal, ethical and commercial aspects of biotechnology and biodiversity. In particular, Natalie’s research interests range from the Patenting of Living Organisms, Indigenous Knowledge and

¹ Commonwealth of Australia IP Australia, Patentable Subject Matter Consultation on an objects clause and an exclusion from patentability, July 2013 p 4
² Recommendation 7.1


Also in 2016, Natalie and her research team, comprising both Indigenous and non-Indigenous researchers, were awarded a three year Australian Research Council Linkage grant to carry out the project, *Garuwanga: Forming a Competent Authority to protect Indigenous knowledge*. This project will work with the Australian Aboriginal Community to identify, evaluate and recommend an appropriate Competent Authority legal structure so Australia can meet the requirements of the Nagoya Protocol while addressing concerns over the form, independence and funding of the Authority so Indigenous knowledge and culture can be protected and shared.
The Purposes of Patent System and their Interactions with Green Technology Innovation Policies

Yu Xiang, Chinese-German Institute for Intellectual Property, School of Management, Huazhong University of Science & Technology, China

Object and purposes of patent system
The purpose of patent law is by protecting the lawful rights and interests of patentees, encouraging invention-creation, therefore promoting the advancement of science and technology and the economic and social development.

Facing the threat of climate change worldwide, how can the patent system apply for promoting green technology inventions on the one hand, and on the other hand facilitating the implementation of green technologies by means of licensing etc.?

Relationship between patent law and related laws and policies
Patent law connects innovation policies and other laws which encouraging the implementation of green technology inventions. Putting the “view on Ecological development” into patent system will protect the balance between the interest of patentees and environment.


Challenges
Today, The effectiveness of patent system and connection to its underlying purposes could be measured by the mechanisms for developing national, regional and international policies which promoting green technologies and environment protection.

However, the existing patent laws in most countries prevent the diffusion of patented green technologies, and do not provide more promotion to the green inventions.

Actions of international organization and in some countries
Policymakers at international, regional and national levels pay increasing attention to the research results related to green patent promotion.

Chapter 8 of ‘United Nations Agenda for Sustainable Development in Twenty-First Century’ suggests legislations which both protecting environment and promoting economy. The UNCCC and some NGOs also try to create more flexible and favorable conditions for the transfer or licensing of green patents.

Some countries, for example UK, the USA, Japan and Korea, have amended their patent
laws and related regulations as well as policies. By means of offering express process for green technology patent applications, and even reducing fees, to ensure fast granting of patent rights, and encouraging the use of the green technologies. In Jan. 2008, cooperated with some other companies, IBM the WBCSD started “Eco-Patent Commons”. In June 2014, Tesla company announced offering some green patents on electromobiles to be used by others for free.

In China, the ‘Administration Measures on prior examination for the application of patent for invention’ of SIPO got into force on August 1, 2012, which offers a express process for the examination of patent applications on green inventions. In June 2016, the Ministry of Industry and Information Technology of China published ‘Industrial Green Development Plan (2016-2020)’, which also encourages creating patent pools of green technologies.

**Expectation & suggestion**
For the purpose of promoting green patents and their effective implementation as well as diffusion, it is necessary to coordinate the amendment and establishment of patent system (including green channel, compulsory license etc.), green innovation policies, and government public service system (including green patents information platform, licensing promotion mechanism etc.)

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**About Yu, Xiang**

Dr. Yu, Xiang is a full professor at the School of Management (2002-) and the Director of Chinese-German Institute for Intellectual Property (http://patent.hust.edu.cn/, 2005-) at Huazhong University of Science & Technology (HUST, http://www.hust.edu.cn/ ) in Wuhan, China. Since March 2017, Prof. Yu also holds the post of the Vice President for International Engagement of Hubei Normal University (http://www.hbnu.edu.cn/, 2017-). His main research fields include Intellectual Property and International Trade, Patent Strategy and Technological Innovation, Licensing and Technology Transfer. He is the Director of the Chinese IP Team for the US-China CERC Project (http://www.us-china-cerc.org/, 2011-), and the Director of the Chinese IP Team for the China-EU/EEA NZEC-CCS Project (2013-). As a guest professor or speaker, he gives lectures and presentations regularly in Germany, France, Switzerland and many other countries. Prof. Yu was granted to be a German Alexander-von-Humboldt Research fellow in 2004, and was granted to be a JSPS (Japan Society for the Promotion of Science) research fellow in 2006-2007. He is a Member of the European Academy of Sciences & Arts (2009-), Member of the IP Experts Group of China (2005-), and visiting professor or lecture professor in many universities in China and other countries. He is also a member of the Standing Committee of the People’s Congress of Hubei Province in China.
Reframing the Software and Business Method Patents Debate around Disclosure and Reuse

James Scheibner, Faculty of Law, University of Tasmania, Australia

Traditionally, patent law was designed to encourage the public disclosure of novel and useful inventions. Any invention not falling within the realm of patentable subject matter for lack of physicality would be protected through copyright. However, advances in computational inventions which may lack inherently physical characteristics have increasingly blurred the boundaries between patentable subject matter and other branches of intellectual property law. For example, there is no requirement for disclosure of the underlying source code for patented algorithms and computer programs in either common law or civil law jurisdictions.

A complicating factor is the way in which computer scientists and informaticians, particularly those in the research community, interact with patent and copyright laws. In particular, the ‘open source’ and ‘open innovation’ movements are dependent on the open disclosure of the underlying invention or creation to support future cumulative innovation. Due to a lack of a disclosure requirement in patent law for intangible inventions, the transaction costs associated with cross licensing as a result of excessive patent activity could potentially stymie open development practices. Nevertheless, the need for open access to source code for open licensing must also be balanced against the need for a means to protect software.

Accordingly, this paper details a qualitative study into open development in computational biology, a merged discipline of computer science, mathematics and molecular biology. This field was selected due to the socially significant downstream benefits in biomedicine and agriculture that can flow from upstream open research. 30 interviewees from computer science, physics, mathematics and biology backgrounds were selected from dual academic-industrial research centres in the US, the EU and Australasia to gauge their reactions to the impact of the patent system. Interviewees in different jurisdictions were chosen to develop a comparative analysis of patent policy, as well as compare how researchers from different disciplines interact with the patent system.
These interviews reveal mixed reception to the role that patents play in computational biology research. Although computer scientists and physicists expressed greater scepticism regarding the role of the patent system than biologists, most of the interviewees were either indifferent or negatively disposed to the role of patents in open source development. Very few interviewees either engaged in searching for patents or filing for patents. These interviewees attributed this to the difficulty in acquiring a patent, the impenetrability of patent claim and description language and cultural perceptions regarding the impact of patents. However, interviewees who did seek patents did so to formalise collaborations with other research teams and develop commercially significant applications of certain technologies so as to support ongoing research.

These results are then used to draw conclusions about potential for reform in the patent system. It is difficult to suggest wholesale reform of the patent system based on an isolated technological case study. However, there has been increasing acknowledgement in the patent literature about the need for patent laws to reflect underlying norms, particularly in the scientific research community. Accordingly, this paper will conclude by providing recommendations to encourage open licensing within dual academic and industrial research.

About James Scheibner

James Scheibner is a final year PhD student based at the University of Tasmania working under the supervision of Professor Dianne Nicol, Dr Jane Nielsen (both of the Centre for Law and Genetics) and Associate Professor Michael Charleston (of the School of Physical Sciences). James completed his Bachelors in Computer Science and Laws before working at two Hobart law firms and then beginning his doctorate in February 2015. James’s thesis investigates the role that formal intellectual property laws (namely patent and copyright) play in open licensing in computational biology. To achieve this, James analyses semi-structured interviews and internal technology transfer policies through the knowledge commons lens, a modified version of the institutional analysis and design (IAD) framework developed by Nobel Prize winning institutional economist Elinor Ostrom. James also works as a research associate at the Faculty of Economics at the University of Tasmania designing econometrics software for use in game theory research in public good and commons based ecology research.
Session 7C
Development and the Interpretation of Rules

GBLT3
Session 7C Chair

*Peter Yu, Texas A&M University School of Law, USA*

Peter K. Yu (余家明) is Professor of Law and Director of the Center for Law and Intellectual Property at Texas A&M University School of Law. Before joining Texas A&M University, he held the Kern Family Chair in Intellectual Property Law and was the founding director of the Intellectual Property Law Center at Drake University Law School. He served as Wenlan Scholar Chair Professor at Zhongnan University of Economics and Law in Wuhan, China and a visiting professor of law at Hanken School of Economics, the University of Haifa, the University of Helsinki, the University of Hong Kong and the University of Strasbourg. He also founded the nationally renowned Intellectual Property & Communications Law Program at Michigan State University, at which he held faculty appointments in law, communication arts and sciences, and Asian studies.

Born and raised in Hong Kong, Professor Yu is a leading expert in international intellectual property and communications law. He also writes and lectures extensively on international trade, international and comparative law, and the transition of the legal systems in China and Hong Kong. A prolific scholar and an award-winning teacher, he is the author or editor of six books and more than 150 law review articles and book chapters. He has served as the general editor of *The WIPO Journal* published by the World Intellectual Property Organization (WIPO) and chairs the Committee on International Intellectual Property of the American Branch of the International Law Association.
The EU has identified research and innovation as key pillars of its strategy to create sustainable growth and prosperity in Europe. Policies that prioritize innovation as being core to regional economic development are exemplified in the Responsible Research and Innovation Policy (RRI) and Research and Innovation Strategies for Smart Specialisation (RIS3).

The underlying premise that drives these policies is that certain regional dynamics are conducive, and therefore can be leveraged, to foster local innovation, growth, and development through collaboration with local stakeholders. However, the assumption that increased local innovation will necessarily lead to local development and growth remains to be proven. Not all regions have the capacity, resources, infrastructure, or access to enable it to reap the socio-economic benefits arising from the development of locally created innovations. In fact, local innovation can lead to growth in another region, such as a nearby metropolitan city better suited to develop the social and economic potential of the innovation, and further drain the region of its assets through migration of intellectual capital to follow the development of the innovation.

The key question is how do the various EU policies and strategies on innovation and growth work together in a local development context. If research is to function as an efficient driver of growth, it is imperative that EU policies support the efficient development of academic discoveries into products and technologies that can address societal challenges and/or achieve socially desirable outcomes. Translation and commercialization are therefore essential to ensure research can be transformed into innovations that can be introduced into the market for the benefit of society. Without intellectual property to safeguard investments in R&D, stakeholders may be discouraged from participating in the innovation process if there is no incentive to collaborate. This paper aims to contribute to the debate on local
socio-economic development by examining the role of higher-education institutions and research infrastructures and the strategic use of IP to attract and retain investment and intellectual capital to regions, while obtaining the optimal socio-economic value from publically funded research. The paper will demonstrate the role intellectual property plays in facilitating local development and its relationship to optimizing the social and economic value of publically funded research and the use of public research infrastructures to foster growth and regional competitiveness.

**About Helen Yu**

Dr. Helen Yu is a researcher at the University of Copenhagen in Denmark and an adjunct at Sciences Po in France. Her areas of research include the role of intellectual property law in the translation of publically funded research and how intellectual property rights can be used as a tool to facilitate local socio-economic development. Helen holds a degree in neuroscience and practiced as an intellectual property lawyer and registered patent and trademark agent for over 8 years before pursuing an academic career.

This paper is supported by the CoNeXT project (http://conext.ku.dk) under the University of Copenhagen’s Excellence Program for Interdisciplinary Research.
An Update on Intellectual Property in Russia

Ivan Zenin, Moscow State University, Russia

The national intellectual property law is evolving towards implementation by Russian law of international intellectual property institutions. This applies to all aspects of intellectual property: copyright, neighbouring rights, patent law, trade mark law and so on.


Implementing institutions were used in Russia 10 years ago, for the codification of the rights to results of intellectual activity and means of individualization under Part IV of the Civil Code. The implementation process will continue as the entry into force of the new international laws involve intellectual property, in particular the Customs Code of the Eurasian Economic Union (2016). However, the codification of the existing and newly implemented Russian and Eurasian intellectual property institutions is accompanied by structural and systemic-intrinsic issues that raise scientific discussion, as well as the search for innovative forms of commercialization of exclusive rights to results of intellectual activity.

For example, according to the Scientific and Consultative Council under the Intellectual Property Rights Court, by entering the WTO, Russia undertook to ensure unified application of the WTO Agreement in the territory of the Russian Federation and to give individuals a right to “inform Russian governmental authorities... on cases of failure to apply or diverse application of provisions of the WTO Agreement in Russian Federation”. Simultaneously, the case law relating to the application of the WTO Agreement when considering cases with participation of individuals was also mentioned, particularly, that applied prior to the entering of this Agreement into force in the Russian Federation. Thus, provisions of the WTO Agreement were applied in the judgments of the Supreme Arbitration Court of the Russian Federation dated 11.04.2012 No. VAS-308/12 dated 28.08.2012 No. VAS-5123/12 and dated 01.10.2012 No. VAS-6474/12.
Therefore, the WTO Agreement was applied directly, according to the case law, in cases with participation of governmental authorities and individuals.

Similarly, in states were provisions of the WTO Agreement are not directly applicable, nevertheless, courts apply these provisions. E.g., in 2003, the US Court of Appeal for the Federal Circuit reversed a resolution of a lower court and interpreted the US law based on the judgment of the WTO Appellate Body as a justification.

Taking the above into account, the Scientific and Consultative Council under the Intellectual Property Rights Court concluded that the absence of relevant regulations in the national laws does not prevent the fulfillment of the international agreement. Provisions of the Russian laws that allow administration of the rights without a contract may not be applicable in contradiction to the WTO Agreement. This conclusion is the only correct as Clause 1 Article 7 of the CC RF, states that “in accordance with the Constitution of the Russian Federation, international agreements of the Russian Federation is an integral part of the Russian legal system”, and the TRIPS Agreement does not provide for collective administration of copyrights and related rights without a contract. The other problem concerns the exhaustion provided for by Article 6 of the TRIPS and parallel imports relating thereto.

About Ivan Zenin

Making Derivative Works Without Authorisation and the Interpretation of ‘Originality and Creativity’ under Thailand’s Copyright Law

Chongnang Wiputhanupong, School of Law, Sripatum University, Thailand

The online environment and digital technology allows its users to create, re-create, and disseminate various kinds of derivative literary and artistic works. Although the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty do not explicitly state that a work needs to bear a qualification of originality in order to be protected by copyright ‘to the mutual advantage of producers and users of technological knowledge ..., and to a balance of rights and obligations.’, the threshold of originality remains a fundamental requirement for copyright protection for works and derivative works in many jurisdictions. On the other hand, in some countries, such as Thailand, this criterion of originality has not been specified as a precondition under copyright law. The Copyright Law (1994) of Thailand merely states that ‘Copyright work under this Act means a work of authorship...’ And by ‘a work of authorship’ the Thai Supreme Court interpreted that these words carry and contain the concepts and meanings of originality. Amongst all, one meaning is that a work ‘must not be created without authorisation from the copyright owner’. Therefore, according to the decisions of the Thai Supreme Court, a derivative work made without authorisation of the copyright owner will not be eligible for copyright protection. It appears that such decisions may deliver an obscure result in the online digital environment, particularly, to the re-creations of those online subsequent creators. This paper, therefore, examines the decisions of the Thai Supreme Court and the Thai Copyright law on
the concept originality and creativity. It also argues and proposes how derivative works made without authorisation of the copyright owner could and should be protected by copyright under the current Thailand’s Copyright Law. The study will be conducted in comparison with the US and the UK based on the issues of originality and creativity, and the copyright protection on the derivative works made without authorisation of the copyright owner.

**About Chongnang Wiputhanupong**

Chongnang Wiputhanupong is a lecturer at School of Law, Sripatum University, Bangkok, Thailand. She received her PhD from School of Law, University of Nottingham. Her researches and interests focus mainly on Copyright, Human Rights, and Media and Communication. Meanwhile, she received a research funding from the National Research Council of Thailand (NRCT) in collaboration with the Thailand Research Fund (TRF) for a research project on the development of the concept of originality and creativity and authorship under Thailand’s copyright system. Her other fields of interest include researches and studies on the relationship between copyright and free speech, particularly the development of copyright and free speech protection in developing countries.
The role and importance of IP has been steadily growing over the years. The development of recent decades has affected the traditional IP division in two branches. The evolution of industrial property and copyright was for many centuries isolated without any relation between them, until their consolidation under the term “IP” through the nineteenth century treaties. Both subsystems have a solid common foundation: the assessment of initiative and intellectual effort, protecting its outcome by granting exclusive use and exploitation.

Today both subsystems are inseparable, so much so that both areas are becoming more and more a single unit, erasing their internal borders. Today we observe that the original criterion of separation is being questioned, primarily due the dynamics of generation and dissemination of intellectual creations and productions through economic interests, whose significance is identical in both IP branches. But also, it is important to consider that the consolidation of this merger is yet a reality in laws and treaties (for example, the TRIPS Agreement).

About Christian Schmitz Vaccaro

Christian Schmitz Vicarro is Vice Chancellor and Associate Professor of the Universidad Católica de la Santísima Concepción (UCSC). He joined the
UCSC in 2001, as an academic at the Faculty of Law. Since 2007 he is part of the Editorial Committee of the Catholic University of the Holy Conception, and from 2012 is a member of the UCSC Superior Council, as representative of the Academics.

He teaches the Diploma in Industrial and Intellectual Property of the Pontificia Universidad Católica de Chile, in addition to developing undergraduate teaching in various institutions of higher education. He has published numerous scientific works oriented to intellectual property, in addition to the books “Chilean Legislation of Intellectual Property” (Editorial Jurídica de Chile, 2011) and “Intellectual Property in light of Free Trade Agreements” (Editorial Lexis Nexis, 2005).

He also serves as arbitrator of the Domain Name Dispute Resolution System of NIC Chile, as well as member of the Registry of Mediators and Arbitrators of Intellectual Property of the National Council of Culture and the Arts. He is a member of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), the Chilean Intellectual Property Association (ACHIPI), the Licensing Executives Society Chile (LES Chile) and the Chilean Bar Association.
Creative Industries in Malaysia: Copyright Reform, Incentive Theory and Industrial and Trade Politics

Ida Madieha Abd. Ghani Azmi, Department on Civil Law, International Islamic University, Malaysia
Rokiah Alavi, Department of Economics, International Islamic University, Malaysia

Malaysia’s New Economic Model identified the creative industries as one of the key drivers to higher incomes in a knowledge-based economy. The government envisaged that the contribution of creative content industry towards the Gross National Income (GNI) to increase by three-fold from RM9.4 billion in 2008 to RM33 billion by 2020. Various policies have been laid out to promote the industry and to make Malaysia as a regional hub for the creative content industry. The National Creative Industry Plan of 2009, is a key initiative to attract investment and create the right ecosystem to support the industry. The government also has acknowledged copyright policy as an important enabler for systematic and sustainable development of the sector. This is reflected in the reforms of copyright law and adoption of TRIPS-plus obligations.

Despite this economic policy and law reform, the Malaysian creative industry has a lackluster performance. This leads to a two-prong inquiry. First, the paper examines the role of copyright in providing incentives for the creators to prosper in this industry. Copyright law was originally developed as a form of reward to motivate creative individuals. In many studies in different countries, however, content creators do not enjoy the fruits of their labour, instead it is the broadcasters or the record labels. Chris Reed and Maria Anagnostopoulou, in a UK White Paper on Using Intellectual Property in the Creative Industries, found that content creators are not the main beneficiaries of copyright rather the main beneficiaries are financiers or those who distribute creative works. This paper investigates what role copyright plays in the business models of the creative industry in Malaysia. Using focus group discussion, the research explores the dynamics among the various actors in the creative industry in Malaysia in order to understand how copyright reward theory is relevant.

The second objective is to examine whether copyright reforms align with economic and trade policies that are intended to promote the creative content industry. Research questions include what are the opportunities and constraints faced by film industry in Malaysia; what are the domestic constraints and external barriers faced by the industry? What are the regulatory and copyright reforms that have been undertaken to support the industry? How do these reforms affect the film industry? Are copyright reforms and economic policies implemented to promote the industry complement each other? Qualitative research methods will be used, consisting of analysis of secondary data and interviews with relevant stakeholders.
Our primary contention is that both the legal reforms and economic policies need to be revisited. The legal reforms must be aligned with the structure and dynamics of power in the industry as well as remaining true to the incentive theory. Copyright reform must also be aligned with economic and trade policies. Misalignment of these two policies will only delay or derail the realization of a knowledge-based economic development strategy.

**About Ida Madieha Azmi**

Prof. Dr Ida Madieha Azmi read LL.B. at the International Islamic University Malaysia from 1985–1989. After being called to the Baar in 1990, she proceeded with her LL.M. at the University of Cambridge and thereafter, her Ph.D at Queen Mary and Westfield College (as it then was), London. She acquired her Ph.D in 1995. She has been a lecturer at the International Islamic University Malaysia since then and is currently a professor of law of the faculty. She has been involved in many legal reform committees involving various issues on intellectual property under the aegis of the Ministry of Domestic Trade and Consumer Affairs. She spend four years as a member of the Board of Malaysian Intellectual Property Office (MIPO) and two years as the Deputy Director of the Copyright Tribunal. She is also a domain name panelist with the Regional Centre of Arbitration Kuala Lumpur and had the opportunity to decide on two disputes. She is also fortunate to assist WIPO in a number of consultancy projects. Her current ventures include drafting Malaysia's guidelines on the enforcement of Intellectual Property for the Malaysian Competition Commission.

Dr Ida is passionate about research and writing and spend most of her time in front of her computer in between running a family of five children and outdoor activities.

**About Rokiah Alavi**

Rokiah Alavi is a Professor at the Department of Economics, International Islamic University Malaysia. She received her Bachelor of Economics (First Class Honours) from University of Malaya in 1986. She obtained her Masters in Development Economics and her PhD from University of East Anglia, England. She has been actively involved in research, teaching and training on WTO and international trade issues. Her research interests are in the area of economics of intellectual property protection, services trade, competition policy and development economics.

She was the Head of Department of Economics, IIUM in 2003 until 2006 and led the Globalization and WTO Unit for 10 years since 2003. She has been the trainer for the Regional Trade Policy Course organized by the WTO since 2004 until 2014 and was part of the teaching team for training programs organized by JICA, IIUM, University Malaya as well as the Malaysian National Institute of Public Administration (INTAN).

She has been awarded research grants from various international organizations such as World Bank, OECD, JIPO, ICTSD, SEATCA and UNCTAD and has published few books and many articles in reputable international journals. She is actively involved in various NGOs and local community associations.
Session 8

The Sui Generis and Intellectual Property’s Frontier

GBLT1
Session 8 Chair

Jessica Lai, School of Accounting and Commercial Law, Victoria University

Jessica C Lai is Senior Lecturer of Commercial Law in the Business School, Victoria University of Wellington. She researches in intellectual property, especially patent law. She has taught related classes at the University of Lucerne, University of Geneva, Goethe University in Frankfurt, Stockholm University and Uppsala University. Before starting at Victoria University, she was a Swiss National Science Foundation Postdoctoral Fellow at the Max-Planck Institute for Innovation and Competition Law in Munich. Jessica holds an LLB Hons, BSc and MSc in Chemistry from Victoria University of Wellington and a PhD in Law from the University of Lucerne.

Margo Bagley, Emory University School of Law, USA

Just a decade ago, a requirement that a designer disclose the origin of traditional cultural expressions, traditional knowledge, and genetic resources used in creating a design in an application to register the design was virtually unheard of in national or regional protection systems.

But as awareness of the many ways in which cultural and other resource misappropriation can occur is evolving, some developing countries have begun exploring whether such a requirement is appropriate and, some have already instituted one. These developments have taken center stage in the World Intellectual Property Organization (WIPO) Standing Committee on Trademarks, Industrial Designs, and Geographical Indications (SCT) negotiations on a draft Design Law Treaty (DLT) which is expected to facilitate the obtainment of design protection globally by limiting design registration requirements.

This paper focuses on the controversy over allowing policy space for such requirements in the DLT, and possible justifications countries may have for desiring the flexibility to impose disclosure requirements on design protection applicants.

About Margo A. Bagley

Margo A. Bagley is an Asa Griggs Candler Professor of Law at Emory University School of Law. She rejoined the Emory faculty in 2016 after ten years at the University of Virginia School of Law, where she was most recently the Hardy Cross Dillard Professor of Law and the Joseph C. Carter, Jr. Research Professor of Law.
Her scholarship focuses on comparative issues relating to patents and biotechnology, access to medicines, genetic resource appropriation, and technology transfer. Professor Bagley served on the National Academy of Sciences Committee on University Management of Intellectual Property: Lessons from a Generation of Experience, Research, and Dialogue, is a technical expert and advisor to the Government of Mozambique in World Intellectual Property Organization (WIPO) matters and consults with companies, governments, and intergovernmental organizations, and other entities on a variety of patent-related matters.

She currently is Lead Facilitator and Friend of the Chair in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore and a Consultant to the UN Food and Agriculture Organization Secretariat for the International Treaty on Plant Genetic Resources for Food and Agriculture. Professor Bagley has published numerous articles, book chapters, and monographs as well as two books with co-authors: Bagley, Okediji and Erstling, *International Patent Law & Policy* (West Publishing 2013) and *Patent Law in Global Perspective* (Okediji and Bagley eds. Oxford University Press 2014). A chemical engineer by training, Professor Bagley worked in industry for several years before attending law school and is a co-inventor on a patent for reduced fat peanut butter. She is a frequent speaker and writer on patent related topics in the U.S. and abroad and has taught in law schools in China, Cuba, Germany, Israel, and Singapore.
Licensing of Traditional Knowledge in Africa

Enyinna S Nwauche, Faculty of Law, Rhodes University, Grahamstown, South Africa

Three recent normative instruments on the licensing of traditional knowledge in Africa: The Swakopmund Protocol for the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organisation 2010; the Kenyan Protection of Traditional Knowledge and Cultural Expressions Act 2016 and the 2016 Regulations on Bio-prospecting, Access and Benefit-Sharing of the National Environmental Management: Biodiversity Act 2004 of South Africa – prompt this presentation on the licensing frameworks of traditional knowledge in Africa by traditional and local communities. This presentation reviews the aforementioned licensing frameworks by considering and evaluating the rights and duties of local communities and licensees; the nature and status of licenses within the constitutional framework of African States; the role of African States in the licensing process generally and their power of compulsory licensing; the transferability of the licenses; cross border implications of the licensing process and the viability of the licensing process within the context of international law and policy.
About Enyinna Nwauche

Enyinna Nwauche is a professor of law at Rhodes University Grahamstown South Africa who has taught in Nigeria and Botswana. A former Director General of the Nigerian Copyright Commission, Enyinna is chair of the Coordinating Committee of the African Network of Constitutional Lawyers (ANCL). His recent book *The Protection of Traditional Cultural Expressions in Africa* is published by Springer International in May 2017.
Protection of Traditional Knowledge: Finding A Legal Framework for Bangladesh

Towhidul Islam, Department of Law, University of Dhaka, Bangladesh

The traditional knowledge (TK) based goods contribute to the economy of Bangladesh. Through generations, the country is rich in different economic-cultural activities including production of foodstuffs, handicrafts, conservation of bio-genetic resources and folk songs. This traditional knowledge has been passed down from generation to generation to continue and thrive the culture and heritage. The neoliberal economic policy across the world that has been creating new markets of apparently never ending new niche traditional products draws an impact on traditional knowledge in Bangladesh. In fact, the Bangladeshi people's ingenuity and entrepreunerships at small and medium enterprises (SMEs) and informal sectors could hardly be denied. The touch of neo-liberalism has created new opportunities for the Bangladeshi enterprises and products. The mass commercialization of traditional knowledge-goods have also brought positive changes to the lives of millions of poor people. However, there arises trade-offs ranging from loss of culture to non-recognition of age-old traditional ingenuity and misappropriation of traditional ingenuity by giant dealers and middlemen have also thwarted huge potentials including exploitation of economic returns of the knowledge goods of the traditional artists in absence of appropriate legal framework.

This leads intermediaries to ride-on the intellectual property of the people on the ground in different ways including the value chain of traditional knowledge-based goods e.g. handicrafts, foods, and others. Given this, while giving in to the proposition that TK could not be protected under intellectual property, this research cites some models for protection of traditional ingenuity within the rubrics of intellectual property. At the end, this work concludes
with a proposition of framing a suitable legal order for Bangladesh containing access and equitable benefit sharing by the intermediaries and buyers and making the mass aware of the local people’s intellectual property rights in traditional knowledge.

About Towhidul Islam

Towhidul Islam is a Professor of Law at the University of Dhaka, Bangladesh, and received his PhD in intellectual property law from Macquarie University, Australia. He holds an LLM in international human rights law from the University of East London, United Kingdom and an LLB (honours) and an LLM from the University of Dhaka. He attended the UN/UNITAR Fellowship in international law at the Hague Academy of International Law, and participated in the WIPO-WTO Colloquium for Intellectual Property Law Teachers held in Geneva and Singapore. He currently teaches intellectual property law, corporate law and land law, and writes extensively in issues involving intellectual property law, corporate law and human rights law. His research articles appear in various reputed refereed journals. He also published one of his books in the United Kingdom.
Righting Wrongs: Rights in Traditional Knowledge as Corrective Justice

Evana Wright, Faculty of Law, University of Technology, Sydney, Australia

This paper addresses the conference theme through an exploration of whether rights in traditional knowledge may operate as a form of corrective justice with the objective of redressing the wrongs suffered by Indigenous peoples. Indigenous people have suffered many wrongs, both historical and contemporary, as a consequence of policies of dispossession, relocation, removal or assimilation. The forced relocation of Indigenous communities and the removal of children from Indigenous families have contributed to the loss of language, traditional cultural expressions (TCE) and traditional knowledge (TK). This loss has been compounded by acts of ‘biopiracy’. These acts of biopiracy involve the misappropriation and exploitation of TK and TCEs without the prior informed consent of the knowledge holders and without sharing any benefits arising out their utilisation.

In the last two decades there has been increasing international recognition of the need to protect TK through a number of treaties and declarations operating on the principles of justice. The Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization both have the objective of ensuring the fair and equitable sharing of benefits arising out of the utilisation of genetic resources and associated TK. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) operates on the ‘principles of justice, democracy, respect for human rights, non-discrimination and good faith.’ With regards to TK, article 31 of UNDRIP explicitly recognises the right of Indigenous peoples to ‘maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’ along with the right to ‘maintain, control, protect and develop their intellectual property rights of such cultural heritage, traditional knowledge and traditional cultural expressions.’ The concepts of equity and justice are also central to the objects clause of the TRIPS Agreement with the focus on mutual advantage, social and economic welfare and balance of rights and obligations expressly stated in article 7.
Existing systems of intellectual property have been insufficient to protect TK. This inadequacy has demonstrated the need for a sui generis regime for the protection of TK. A sui generis regime can better adapt to the needs and expectations of Indigenous communities and may be used to incorporate aspects of customary law and practices. Such a sui generis regime would secure the rights of Indigenous communities in their TK ensuring that any use of TK is subject to prior informed consent and fair and equitable benefit sharing. This paper will explore whether a sui generis regime for the protection of TK may also operate as a form of corrective justice whereby rights in TK may be used as a tool to return to Indigenous communities those institutions that support Indigenous culture, values and practices and thereby redress some of the historical and contemporary injustices that have and continue to occur. The analysis will be undertaken with specific reference to the sui generis regimes for the protection of TK established in India and Peru.

Her thesis examines the emerging international framework for the recognition and protection of Indigenous traditional knowledge and its implementation in India and Peru with the objective of identifying lessons for Australia in developing a nationally consistent regime for the protection of traditional knowledge. Evana submitted her thesis for examination in June 2017 and is currently working as a Research Associate on the ARC Linkage Project ‘Garuwanga: Forming a Competent Authority to protect Indigenous knowledge’. Evana also teaches Patent Law and Global Aspects of Intellectual Property in the Masters of Intellectual Property Program in the Faculty of Law and is also an academic mentor in the Bachelor of Creative Intelligence and Innovation in the Faculty of Transdisciplinary Innovation at the University of Technology Sydney. Evana has a BSc and LLB from Macquarie University and LLM (Honours) from University of Technology Sydney. She was admitted as a legal practitioner in the Supreme Court of New South Wales in 2006.

About Evana Wright
Evana Wright is a Research Fellow and former Quentin Bryce Law Doctoral Scholar at the University of Technology Sydney. Her research interests are in the area of intellectual property and the protection of Indigenous traditional knowledge.
Non-conventional copyright: do new and non-traditional works deserve protection?

Enrico Bonadio, The City Law School, London, UK
Nicola Lucchi, Jonkoping International Business School, Sweden

The proposed investigation aims to draw a picture of current possible new spaces for copyright protection. The presentation will, in particular, expand on whether modern copyright law should be more flexible as to whether new and unconventional works - including graffiti, tattoos, land art, culinary works, sport movements, yoga, jokes, magic tricks, dj-sets, perfume making, TV formats, typefaces, news snippets, illegal and immoral works – deserve protection. This could be secured, for example, by interpreting the rules on protectable subject matter more broadly as well as relaxing the requirements to obtain protection.

The first copyright statutes granted protection only to a very few works such as books, charts and maps. In several jurisdictions, for example UK, the belief has for long been shared that just selected and closed categories of artistic and creative endeavours deserve to be protected by this intellectual property right. Yet, such belief has subsequently proved anachronistic, also as a consequence of technological progress. Indeed, the subject matter protected by copyright laws has progressively expanded over the years, covering inter alia photographs, phonographs, works of applied art, films and broadcasts, computer programs and databases: this has taken place not only in jurisdictions having an “open-ended list” of authors’ rights subject matter (such as France, Germany and Netherlands), but also in countries with “closed lists”.

The progressive expansion of copyrightable subject matter has not stopped. Authors and creative people are indeed continually finding new ways of expressing themselves, being often difficult to foresee the forms that these new expressive methods will take. And the way the traditional, exhaustive and privileged classification of copyrightable works have been defined (as well as the narrow way “open-ended lists” have often been interpreted by courts) has still little to do with how several contemporary artists, practitioners of new forms of art and entertainment and even commercial enterprises nowadays define their own practice and activity. Therefore, rigid classifications as well as judicial “restrictions” of copyrightable subject matter may (again) become anachronistic as an increasing number of creative human endeavours may produce results which arguably do not fall within any of the enumerated (or judicially identified) categories of protectable works, but that are nevertheless the result of intellectual efforts.

The presentation will focus on those forms of expression (see the list above) which have recently
attracted attention amongst copyright scholars. In particular, the subjects have been selected with the mere purpose of identifying trends and highlighting possible commonalities and differences in the progressive expansion of the protectable subject matter. In particular, we have selected just those topics that have had or may have jurisprudential impact or have contributed to policy changes at the national level.

About Enrico Bonadio

Enrico Bonadio is Senior Lecturer in Law at City, University of London (The City Law School), where he teaches various modules on intellectual property (IP) law. He holds law degrees from the University of Florence (PhD) and the University of Pisa (LLB), and is Deputy Editor in Chief and Intellectual Property Correspondent of the European Journal of Risk Regulation.

He regularly lectures, publishes and advises in the field of UK, European and international intellectual property law. His current research agenda focuses on copyright protection of unconventional works including graffiti and street art, and he is co-editing two books: (i) “Non-Conventional Copyright - Do New and Non-Traditional Works Deserve Protection?” (Elgar, forthcoming 2018); (ii) “Copyright in Street Art and Graffiti – A Country-by-Country Legal Analysis” (Cambridge University Press, forthcoming 2019).

Enrico is Visiting Professor in IP Law at Université Catholique de Lyon (France) and University of Turku (Finland) as well as visiting lecturer at the WIPO LLMs in Intellectual Property offered the University of Turin (Italy) and Ankara University (Turkey). He has also been a Visiting Scholar at Melbourne Law School (University of Melbourne, 2013) and City University New York (CUNY Law School, 2016). His research and teaching interests have led him to give talks and papers in universities and institutions in all five continents.

About Nicola Lucchi

Nicola Lucchi is Universitetslektor, Docent (tenured Associate Professor) at the Jönköping University International Business School (Sweden) where he is also affiliated researcher of the Media Management and Transformation Centre (MMTC). Prior to joining JIBS, he was EU Marie Curie post-doc Fellow Researcher at the Université catholique de Louvain - Institut pour la recherche interdisciplinaire en sciences juridiques (Belgium) and research associate at the University of Ferrara (Italy).

He holds a PhD in law from the University of Padua, a Degree in Law and a postgraduate certificate in EU Law both from the University of Ferrara, Italy.

Nicola’s research interests focus on comparative business law and policy and the interaction between law and innovation. His current research agenda centers on IP rights in scientific and technological innovations; geographical indications and knowledge commons and on non-conventional copyright subject matters.
Where is the design? To capture the essence of EU design protection and verify its adequacy

Anna Tischner, Faculty of Law, Jagiellonian University, Krakow, Poland

More than 15 years ago a new sui generis design regime was introduced in Europe (designed from the outset almost without any clear and binding indicators from international law). The EU design regime is commonly assessed as a highly successful one. However, this time bracket gives us a good opportunity to verify the accuracy of this form of protection, its adequacy for designers, industry, and society needs.

The new pan-European design legislation aimed at enhanced protection of design as an important marketing tool was proceeded by research of industry needs. The key concept of the EU design protection is its object which is the external aspect of a product and the economic value which is attached to the appearance of products being a main instrument of products’ differentiation on the market.

The issue Where is the design? is addressed from the two perspectives (micro- and macro-). The first one, the closest to the primal problem of the object of the European design protection, is focused on identification of the substance of the protected subject matter.

Presentation of the essence of immateriality in designs must be visual not verbal which is in line with the old saying that “a picture is worth a thousand words”.

The core value of the design should be encapsulated in the graphical representation constituting the visual information about the object of protection. An adequate presentation of the essence of design is a major hurdle in this area of law.

The description as a natural tool of explaining the ambiguous images is eliminated. Recent decisions in design cases in Europe (e.g. Apple v. Samsung, Trunki) reveal the weaknesses of this form of protection in that regard. There is a need for working out a common language for those who create and those who interpret designs by way of verbalizing the visualization to avoid misunderstandings and protect the very value of design through the mechanism that design right offers.
The aim of the paper is also to verify the rationale and adequacy of the European design regime in the macro-perspective. In fact, design is much more than only the appearance of a product; its value is not only visual. It presents a true hurdle to cover the core value of design creativity by the design protection.

The question Where is the design? will be used to verify the coherence of the design right concept and its autonomy within the IP system taking into account the fact that the design right covers any use of the product’s appearance (i.e. applied to a product but also only visualized).

The assessment of the EU design right adequacy should include the social functions and human values of the so called thoughtful design and its complex role in modern industrial societies which cannot be limited to encouraging creation of attractive product’s appearance only. The question is whether there are viable instruments in the EU design regime to address these social and environmental issues and the design’s role in transforming our society?

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About Anna Tischner

Anna Tischner (dr hab.) holds law degrees from the University of Gdansk (master) and the Jagiellonian University (dr and hab.). She is an associate professor at the Intellectual Property Law Chair of the Jagiellonian University in Cracow, Poland. Anna’s main field of academic interest is: industrial property and unfair competition law. She is especially interested in European design law.


She is also a member of the External Advisory Board of EIPIN Innovation Society programme.
Session 9
National Policy Drivers
GBLT1
Session 9 Chair
*Tana Pistorius, University of South Africa*

Tana Pistorius holds the Department of Science and Technology/National Research Foundation South African Research Chair in Law, Society and Technology hosted by the College of Law, UNISA. She is a part-time Member of the Information Regulator.

Tana's fields of specialization include intellectual property (IP) law, information technology law and the management of IP law. Tana is an attorney, a notary and a rated researcher. She is a senior adjudicator of the SAIIP alternate dispute resolution panel for the .za domain name system.

She is a research fellow of the Alexander von Humboldt Foundation and she works with the ITU on e-commerce and the WIPO Academy on IP teaching. She serves on the editorial boards of the *WIPO-WTO Colloquium* and the *Journal for Juridical Science*. She is the Editor-in-Chief of the *International Journal of Intellectual Property Management* (Inderscience). Tana serves on the executive committee of the International Association for Teachers and Researchers in Intellectual Property (ATRIP).
The Object and Purpose of Intellectual Property: a national, creative, adversarial approach

Abbe E. L. Brown, School of Law, University of Aberdeen, UK

The paper will explore the object and purpose of intellectual property from both a confrontational and practical perspective.

On a conventional analysis the object and purpose of intellectual property ("IP") is to encourage and reward different forms of innovation and creativity, which will contribute to addressing societal challenges at least in the longer term. Valuable work against the backdrop of Articles 7 and 8 TRIPS and proposals developed regard their impact (Slade) particularly regarding the place of IP alongside other laws in dispute resolution (Frankel) and more generally (Grosse Ruse-Khan) makes it clear that all this exists alongside, and is intertwined with, other legal fields.

These intersections remain under developed at national level, particularly regarding addressing climate change through technology against the backdrop of the UN Framework Convention on Climate Change and its outputs and Technology Mechanism.

For example, UK climate change policies note the benefits of IP in encouraging technology and do not engage so deeply in its possibly negative implications (problematic even in the light of work, eg Barton, indicating that IP is not always a barrier to technology transfer); climate change legislation from the UK jurisdictions does not engage with IP; and most national IP laws do not include specific exceptions addressing climate change. There are different bases at national levels to challenge lack of engagement with climate change, including possibly through technology questions – examples can be seen from the Indian Green Tribunal, Youth v US and Urgende in the Netherlands.

Yet these arise in fora which are not focusing on IP questions. The complex question of the object and purpose of IP is likely to be ignored – the contrary issue to that in IP litigation which might ignore, or feel legally unable to consider, the wider implications of an infringement action.

This paper will develop arguments for how courts in the UK, particularly when faced with the prospect of the removal of the Human Rights Act and EU fundamental rights can be required to have regard to all laws which are (practically) relevant to the challenge before them (be they focused on IP, climate change or indeed human rights or sustainable development) – even if the pleading is not so framed. Courts should resist the temptation, and the
traditional view, to consider such wider questions irrelevant; rather, courts should consider deeply the object and purpose of IP – and that of other fields. The proposals will involve innovative, and indeed confrontational, approaches to judicial power, statutory interpretation and links with international activity. Yet embracing this problem, and looking beyond legal silos within appropriate national and regional parameters, is relevant to all teachers and researchers of IP. The paper will provide new approaches for lawyers and courts when faced with challenging cases, particularly those in a common law, dualist adversarial system.

About Professor Abbe E. L. Brown

Professor Abbe E. L. Brown is a legal researcher and teacher at the University of Aberdeen in Scotland. Abbe’s main research interest is the laws relating to intellectual property and innovation, their intersection with other legal fields, and the impact of this on key societal challenges.

Abbe’s current projects involve intellectual property, climate change and technology; intellectual property, disability and personhood. Key publications are *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology* (Edward Elgar 2012), the edited collection *Environmental Technologies, Intellectual Property and Climate Change* (Edward Elgar 2013), several editions of the respected OUP textbook *Contemporary Intellectual Property: Law and Policy*, many contributions to internationally respected collections and journals, and with Professor Charlotte Waelde a forthcoming edited collection *Intellectual Property and the Creative Industries* to which many ATRIP members have kindly contributed. Funding sources for her research include the Modern Law Review, the UK Arts and Humanities Research Council, the Carnegie Trust for the Universities of Scotland and the Wellcome Trust. Abbe sits on the Technology Committee of the Law Society of Scotland, the Public Benefit and Privacy Panel of NHS Scotland and the Executive of the British and Irish Law, Education and Technology Association and is a frequent peer-reviewer for publishers, journals and funders. Abbe has a PhD from the University of Edinburgh, a Diploma in Intellectual Property Law and Practice from the University of Bristol, an MA from the University of Cambridge and is a solicitor admitted to practise in England and Wales, Victoria (Australia) and Scotland. She is @IGFTowardAccess.
The Fourth Industrial Revolution is a reform of social structure in which manufacturing is driven by smart Cyber-Physical System (CPS) with integration of internet of things, 3D printing, robotics, artificial intelligence, big data and other integration technologies. Though China is the second largest economy in the world, more and more problems have emerged in China. China manufacturing industry needs a transformation to survive in global competition, growing up from a big manufacturing country to a strong one, which is the goal for Made in China 2025. The core strategy for the 4th Industrial Revolution and Made in China 2025 is “Intelligent Manufacturing” supported by digitalization and network. Strengthening intellectual property protection is also the focus of Made in China 2025. So far, creation of intellectual property in China has achieved remarkable progress, and China has developed a fairly complete legal framework on IP protection, has participated actively in international cooperation of patent prosecution and trademark registration, will welcome golden age of IPR service industry. Handling of intellectual property cases is increasingly specialized and integrated in China. However, Intellectual property in China wins at quantity and loses at quality. Tense relationship between intellectual localization and internationalization still exists in Chinese intellectual property system. Decentralized arrangement of
administrative department has negative impacts on intellectual property management. Several problems of specialized intellectual property courts have arisen in its operation.

**About Du Ying**

Du Ying, professor and director for IP Research Center, School of Law, Central University of Finance and Economics (CUFE). She got her Doctor in law from Peking University (2000) and LL.M from Yale University (2007). Focusing on IP research and teaching, she has already published two monographs, authored two textbooks, of which one is *Intellectual Property Law* (2015), and the other is *Trademark Law* (2010, 2014), coauthored two IP textbooks. In Chinese core legal journals, she has published more than 70 articles. As a fulltime professor at CUFE, she teaches basic intellectual property courses for undergraduate program, one in Chinese and the other in English, and advanced intellectual property course for graduate program.
Access to Knowledge and the Purpose of IP Protection

Alfred Früh, Center for Information Technology, Society and Law, University of Zurich, Switzerland

Access to knowledge has always been a key issue with regards to Intellectual Property Rights (IPR). The fact that knowledge may be protected legally (and oftentimes both factually and legally) has repeatedly caused concerns in the general public or with specific interest groups. Balancing these interests with the interests of right holders is a continuous challenge for IPR systems. This is not only true for balancing interests in general, but also in very specific situations (i.e. the protection of standard essential patents in telecommunications standards — as opposed to the protection of inventions in the telecommunications field in general, where IP protection as such is not questioned). This paper aims to demonstrate that much can be learned about the object and purpose of IP by looking at how IPR systems grant access to knowledge in these specific situations.

Access to knowledge may be granted at three distinct levels. First, at the level of IPR, generally by providing for exceptions and limitations, second, at the level of the overarching framework providing rules for working competition (e.g. by means of unfair competition law, antitrust law, regulation and self-regulation), and third, at the level of broader public interest considerations, such as health, environmental protection and public morale/ethics (by regulation or by rules of procedure). Norms pertaining to different levels may be present in the same body of law, i.e. in the TRIPS-Agreement. But separating IPR, competition and general policy concerns on different levels should not only lead to a deeper understanding for all of them: Setting aside competition and general policy concerns should also uncover (possibly muddled) IPR considerations that supposedly are ‘the essence’ of object and purpose of IPR.

Examination of these levels in situations in which either the public or interested third parties typically claim that they should have access to specific information (e.g. regarding access to patented
medicine or access to standard essential patents) yields a clearer picture of the object and purpose of IPR. The insights of this exercise can thus inform policy choices when dealing with issues regarding access to knowledge in the future.

**About Alfred Früh**

Alfred Früh is a Postdoctoral Researcher and the Managing Director of the Center for Information Technology, Society, and Law (ITSL) at the University of Zurich in Switzerland. His research activities focus on all aspects of law in the digital age, intellectual property (IP) law and competition law. He is currently teaching IP law and IP contract law at the University of Zurich.

Alfred earned his law degrees at the University of Zurich (lic.iur., Dr.iur.) and spent three years as guest-in-residence at the Max Planck Institute for Innovation and Competition in Munich, Germany. Prior to joining ITSL, he took the Swiss bar and worked in private practice with an international law firm.

He has published a PhD thesis on the interplay of competition and intellectual property law and a number of articles in related fields. He is currently working on issues such as data ownership, privacy, access to knowledge, and transparency.
Do Legislative Limitations and Judicial Attitudes to Copyright Enforcement Encourage Piracy?: Lessons from Fiji

Salvin Nand, University of Fiji

Free market economists argue that government intervention should be strictly limited as it tends to cause an inefficient allocation of resources. On the same token, Keynesian economist advocate for government economic intervention policies to achieve optimal economic performance. Economic theories of copyright enforcement have focused on enforcement that is broad-based in that it raises the cost of piracy to all consumers.

However, copyright enforcement normally target high-value users, allowing copyright holder’s to charge super-normal prices that in turn encourage low-value buyers to switch to inferior pirated copies. In Fiji, policy attempts to make pirated copies costly through tax levy on reproduction technologies, by destroying and confiscating illegal copies or by prosecuting distributors of pirated goods has been futile. Fijian copyright proscripton is limited by its scope and largely humbled by the relaxed attitude of judiciary towards distributors of pirated goods. With two successful music piracy cases since the inception of copyright laws in 1999 raises question whether piracy exist in Fiji or enforcement authorities face difficulties in combating piracy.

Be that as it may, this paper aims to show that diluted laws with limited enforcement capacities and lax attitude of judiciary inversely promote piracy. Therefore, in contrast with the case of more intensive copyright enforcement, more extensive copyright enforcement over some range can safeguard intellectual property.
About Salvin S. Nand

Salvin S. Nand is a registered lawyer in Fiji and currently a senior law lecturer at the University of Fiji. Salvin has been researching and teaching intellectual property and corporate laws in the Pacific for past Seven (7) years. He holds a master of laws in intellectual property from the Queensland University of Technology jointly offered by the World Intellectual Property Organisation. He has a second Master of Laws degree from the Victoria University of Wellington.

Mr. Nand is a co-editor with two journals: UniFiji Law Review and Asia-Pacific Journal of Education, Business, and Society (APJEBS). Further to legal studies, he has completed a Postgraduate Diploma in Governance and Public Policy at the University of Fiji. Mr. Nand has presented various research papers at the international/local conferences. Mr. Nand was recently awarded the Vice Chancellor Research Excellence Award for his research and publication in the areas of intellectual property, public policies and small to medium enterprises issues in the Pacific.
Aligning Intellectual Property and Labour Law Objectives

Lee-Ann Tong, Faculty of Law, University of Cape Town, South Africa

The topic explores the relationship between the allocation of intellectual property ownership (and the recognition of non-economic rights) and national imperatives which underlie policies relating to innovation and labour. The contemporary innovation context is characterised by corporate initiative and investment, with individual authors and inventors making their intellectual contribution within the context of this corporate framework.

Although the rationale for granting exclusivity over intellectual labour continues to be debated, the broad justification of the system as an incentivisation mechanism to encourage innovation does not appear to be threatened. In short, such incentive lies in the economic exclusivity which intellectual property rights secure for intellectual property owners.

For the system to work, ownership of the intellectual property must be allocated in a way that will elicit subsequent innovative activity. From an intellectual property law perspective, this allocation generally proceeds from the basis that it is possible to identify an individual or individuals whose intellectual labour is the starting point for such allocation.

The effect is usually that default ownership and recognition resides with individual authors and inventors. Corporate innovators are recognised through deviations from this starting point, usually through provisions which link corporate title to the existence of an employment relationship with the author or inventor.

However, when crafting intellectual property ownership rules, the theoretical justifications for intellectual property are pitted against other national imperatives, one of which is the protection of employees. However, labour regulation is informed by imperatives which do not necessarily align with intellectual property principles.

In South Africa this relationship between intellectual property laws and the regulation of employment, has not received significant attention. However, as a developing country which is in the midst of crafting its first national policy on intellectual property, the further development of intellectual property laws will inevitably be subject to national imperatives.
current iteration of the policy, the Draft Intellectual Property Policy Phase 1 (2017) directly links intellectual property development to the National Development Plan of South Africa (NDP), and the National Industrial Policy Framework (NIPF), both of which are geared towards driving progress, growth and wealth through enhancing innovation, among other things. The provision of decent opportunities for labour is one of the goals of the NDP and NIPF. One of the objectives of the draft policy is ‘to nurture and promote a culture of innovation, by enabling creators and inventors to reach their full potential and contribute towards improving the competitiveness of our industries’.

The issues which South Africa will have to navigate in light of the divergent purposes of intellectual property rights and labour law include how employment should be conceptualised in the context of ownership of intellectual property, how the incentive rationale for intellectual property rights ought to be construed in the employment context, whether labour law principles oust intellectual property objectives, and the role of contract as a mechanism to ensure an optimal default allocation.

About Lee-Ann Tong

Dr Lee-Ann Tong is a senior lecturer in the Faculty of Law at the University of Cape Town, South Africa. She teaches intellectual property law at undergraduate and postgraduate level. She is currently the programme convenor for the School for Advanced Legal Studies LLM programme in Intellectual Property law. She is a co-founder and -editor of the South African Intellectual Property Law Journal. Her interest is in exploring the intersections between intellectual property ownership and labour law.
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