

**Emily C. & John E. Hansen Intellectual Property Institute**

**29th Annual Intellectual Property Law & Policy  
Conference**

www.fordhamipinstitute.com

**Thursday and Friday, April 21 – April 22, 2022  
(online)**

**Hugh C. Hansen  
Director**

*Learn    Debate    Have Fun*

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**CONFERENCE PROGRAM**

**Thursday, April 21**

**Welcoming Remarks:**

Thursday 8:00 AM – 8:15 AM

**Hugh C. Hansen**

Fordham University School of Law, New York

**Joseph Landau**

Fordham University School of Law, New York

## **SESSION 1: Plenary Sessions**

Thursday 8:15 AM – 11:10 AM

### ***1A. Government Leaders' Perspectives on IP***

Thursday 8:15 AM – 9:45 AM (90 minutes)

#### Moderator:

#### **Hugh C. Hansen**

Fordham University School of Law, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

#### Speakers:

#### **António Campinos**

European Patent Office (EPO), Munich

#### ***Unitary Patent and UPC: A New Opportunity***

This year will see the biggest step forward in patent protection in Europe since the 1970s. A new form of patent protection, the Unitary Patent, will be launched, along with the Unified Patent Court. The EPO will be at the heart of this change, which will deliver new opportunities for businesses and help to transform innovation in Europe.  
(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Shira Perlmutter**

U.S. Copyright Office, Washington, D.C.

#### ***Expanding Access to the Copyright System***

In order to maximize the copyright system's role in fostering creativity, adding to human knowledge, and enriching culture, its benefits must be broadly accessible.

This means making the tools needed to assert and license rights available, understandable and user-friendly, and ensuring that the system evolves in ways that are balanced and well-calibrated. This talk will highlight current Office initiatives aimed at furthering these goals, including through technological development and the enhanced use of data.

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Marco Giorello**

European Commission, Brussels

#### ***Copyright Policy in the EU- What's on and What's Next?***

The talk will provide an overview of the ongoing copyright discussions at EU level, more than two years after the adoption of the Digital Single Market reform. It will present a state of play of the implementation of the new rules across EU Member States and of their first impact on the market. It will also look at the current priorities for the European Commission in the copyright area.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Antony S. Taubman**

World Trade Organization (WTO), Geneva

#### ***COVID-19 and the TRIPS Agreement – What Lessons for the Future?***

The COVID-19 pandemic has posed unprecedented and multifaceted challenges for fast-track pharmaceutical innovation, for the accelerated regulatory approval, production and global distribution of vaccines, and for the dissemination and uptake of new technologies. Given the role and impact of intellectual property through various dimensions of the pandemic response, the past two years have served as a probing stress test of the international intellectual property system - setting the WTO TRIPS Agreement at the center of an intensive debate about how to overcome inequities in access to medicines, especially vaccines. The disruptive impact of the pandemic has spurred changes in the way many work, trade and share knowledge, accelerating trends towards on-line interactions that place additional demands on the IP system. This presentation suggests some of the consequent lessons learned for the international law, policy and practice of IP.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Kathi Vidal**

U.S. Patent and Trademark Office (USPTO), Alexandria

#### ***Back to First Principles: Promoting Innovation for the Public Good***

In 1788, James Madison invoked “the public good” as justification for the establishment of a patent system in the United States. The framers of our Constitution believed the patent system would promote economic growth and a higher standard of living for all. As technologies evolve at a rapid pace and include ideas envisioned only in the sci-fi books of our childhood and innovations never envisioned by our Founders, we need to think critically about the underlying goals of our system as we make decisions and shape our future.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**General discussion: 30 minutes (speakers, panelists and members of the audience)**

**Break**

9:45 AM – 9:50 AM

***1B. Key Current IP Issues: Reflections & Analysis***

Thursday 9:50 AM – 11:10 AM (80 minutes)

Moderator:

**Hugh C. Hansen**

Fordham University School of Law, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**Paul R. Michel**

U.S. Court of Appeals for the Federal Circuit, Washington, D.C. (retired)

***Injunctions as the Driver of Licensing and Technology Sharing and Essential to Vindicating the Patentee's Right to Exclude***

This remedy creates incentives to respect IP rights and license them as needed, and it encourages innovation investments. When injunctions are rarely available, investments fall and accused infringers are encouraged to drag out litigation. Even after infringement of a valid patent has been found, adjudicated infringers are encouraged to decline license offers and can expect to get the past damage amount applied to continuing infringement even though their infringement is now, by definition, willful. The inversion of injunction practices under dicta in the Kennedy minority concurrence in eBay, as applied ever since, has enfeebled the patent system.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Denny Chin**

U.S. Court of Appeals for the Second Circuit, New York

***As Time Goes By: Judging Through the Years***

Judge Denny Chin of the Second Circuit has been a federal judge for more than 27 years. In this talk he reflects on how judging and federal practice have changed over the years.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**He Jing**

Gen Law Firm, Beijing

***What is “Big Protection of IP” in China?***

The concept of “Big Protection of IP” is gaining grounds in the China IP policy landscape. What does it mean and how will it impact on IP enforcement, standard essential patents, trade secret or pharmaceutical IP? Where will the National IP Court be in the next five years?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Richard D. Arnold**

UK Court of Appeal, London

***Legally Enforceable Global Arbitration of SEP/FRAND Disputes***

The essential question raised by the EU’s WTO complaint against China is who should decide the terms of FRAND licenses of SEPs on a global basis. The answer to this problem must involve a supranational procedure for resolving these disputes which is acceptable to all interested parties. The obvious answer is global arbitration. In order for this solution to work, arbitration must be made legally enforceable. A method for achieving this has been proposed, and the objections raised against the proposal to date are not convincing.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelist:

**Renata B. Hesse**

Sullivan & Cromwell LLP, Washington, D.C.

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 30 minutes (speakers, panelists and members of the audience)**

**Break**

11:10 AM – 11:25 AM

**Session 2: PATENT LAW**

**Concurrent Session**

Thursday, 11:25 AM - 3:00 PM

***2A. Unified Patent Court***

Thursday 11:25 AM – 12:25 PM (60 minutes)

Moderator:

**Anne-Charlotte Le Bihan**

Bird & Bird LLP, Paris

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Klaus Grabinski**

Federal Court of Justice, Karlsruhe

***The UPC Is Coming – Outline and Update***

The protocol on the provisional application of some provisions of the Unified Patent Court Agreement (UPCA) has come into force on 19 January 2022. The provisional application period, that is deemed to last at least eight months, will allow conducting final preparations for the establishment of the UPC, namely the recruitment of judges, the finalization of the electronic case management system and a last revision of the draft rules of procedure. This talk will give an outline of and an update on the first patent court that will be a court common to a multitude of states.

**(up to 15 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Aloys Hüttermann**

Michalski, Hüttermann & Partner, Düsseldorf

***Keeping the Cake and Eating It When Opting out at the UPC? – The Hüttermann-Gambit***

Art. 83(3) UPCA prevents patent holders from filing a lawsuit at the UPC and opting out later. However, there is a way to “keep the cake and eat it”, i.e. to try out the UPC first and then opt-out later for the same patent by filing a preliminary injunction instead. This “Hüttermann gambit” relies on the wording of Art 83(3) as well as the rules of procedure, which clearly distinguish between actions (*Klagen* in the German version) and preliminary measures.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Myles Jelf**

Bristows LLP, London

**Miquel Montaña**

Clifford Chance LLP, Barcelona

**Edger F. Brinkman**

Court of The Hague, The Hague

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 20 minutes (speakers, panelists and members of the audience)**

**Break**

12:25 PM – 12:35 PM

## ***2B. Patents and Public Health***

Thursday 12:35 PM – 1:40 PM (65 minutes)

Moderator:

**John R. Thomas**

Georgetown University Law Center, Washington, D.C.

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Joshua D. Sarnoff**

DePaul University College of Law, Chicago

***Pandemic Vaccines and Inequitable Global Distribution***

By the end of 2021, the global biopharmaceutical industry (aided by massive infusions or promises of government funding) had developed about 12 billion doses of COVID-19 vaccines, which is a stunning achievement. Yet, only about 15% of people in low-income countries had received even a single dose, compared to about 65% of the world's population having done so, and with many in wealthier countries receiving multiple doses and boosters. We need to address why the vaccines that were developed at scale were mostly those that could not be distributed equitably, why countries were allowed to preferentially obtain and hoard supplies of those vaccines for their own populations, and why we haven't solved the supply chain issues with the same amount of resolve that went into product development.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Catherine Fitch**

Merck & Co., Inc., Rahway, New Jersey

***Accelerating Global Access to Molnupiravir***

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

## **Justin Hughes**

Loyola Law School, Los Angeles

### ***The TRIPS Covid Patent Waiver – Policy Substance and Geneva Kabuki***

The EU, India, South Africa, and the US recently announced an agreed framework on a “waiver” for patent rights related to COVID-19 vaccines as well as its possible extension to therapeutics and other coronavirus treatments. While this deal will not, by itself, change the global landscape of vaccine production, it may be another step in making intellectual property discussions in Geneva less acrimonious and less ideological.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### Panelists:

#### **James Love**

Knowledge Ecology International, Washington, D.C.

#### **Gustavo de Freitas Morais**

Dannemann Siemsen Bigler & Ipanema Moreira, São Paulo

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 25 minutes (speakers, panelists and members of the audience)**

### **Break**

1:40 PM – 1:50 PM

## ***2C. U.S. Patent Developments***

Thursday 1:50 PM – 3:00 PM (70 minutes)

### Moderator:

#### **Martin J. Adelman**

The George Washington University Law School, Washington, D.C.

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

### Speakers:

#### **Nicholas P. Groombridge**

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York

#### ***U.S. Patent Developments Overview***

**(up to 25 minutes)**

Panelists:

**Laura Sheridan**

Google, New York

**Carey R. Ramos**

Quinn Emanuel Urquhart & Sullivan LLP, New York

**Marjan Noor**

Allen & Overy LLP, London

**Nahoko Ono**

Lerner David, Cranford, New Jersey

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 40 minutes (speaker, panelists and members of the audience)**

**Session 3: COPYRIGHT LAW & CONCURRENT SESSION**

**Concurrent Session**

Thursday 11:25 AM - 3:00 PM

***3A. EU Copyright Developments***

Thursday 11:25 AM – 12:20 PM (65 minutes)

Moderator:

**Stanford McCoy**

Motion Picture Association EMEA, Brussels

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**Eleonora Rosati**

Stockholm University, Stockholm

***The DSM Directive 3 Years On: State of Play***

Directive 2019/790 was adopted in April 2019 to realize a "Digital Single Market" in the EU. EU Member States were required to transpose it by June 2021. 3 years later, the map of national transpositions is still incomplete and the national solutions adopted so far suggest that the digital market of the EU might be anything but a *single* one. The Polish challenge to Article 17 (C-401/19) and the ongoing discussion around the Digital Services Act also pose fundamental questions relating to the application of the Directive and its national implementations.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

## **Ursula Feindor-Schmidt**

Lausen Rechtsanwälte, Munich

### ***A New Cooperative Approach Between Rightsholders and Platforms***

When it comes to enforcement of copyrights on large platforms which allow users to upload content ('online content sharing service providers', OCSSPs), the European Law had been shaped by a number of cases, including the latest CJEU decision on the platforms YouTube and Uploaded (CJEU, C-682/18 and C-683/18) in June 2021. In the same month the EU member states had to implement the Digital Single Markets Directive, including Article 17 which provides for new rules for liability of OCSSPs. Although Article 17 is still under attack by a claim by Poland, this legislation is now in full force in a growing number of EU member states. The new law seeks to strike a balance between a meaningful protection of rights and the realities of mass communication. On this basis it implements a more cooperative approach between rightsholders and platforms, special conditions for automated processes on platforms and quantity-exceptions for user generated content.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

## **Lauri Rechartt**

International Federation of the Phonographic Industry (IFPI), London

### ***DSA, Perils of One-Size-Fits-All Liability Privileges***

Copyright holders seem collateral damage in the EU Digital Services Act (DSA). Contrary to its stated aims, as it stands, the DSA proposal -- which is still negotiated between the EU co-legislators -- fails to strengthen in any meaningful way copyright holders' position vis a vis online intermediaries. That is at least partly due to the horizontal nature of the EU online liability privileges (aka safe harbors). The presentation takes a look at the state of play, and whether and why the DSA helps or hinders copyright holders' enforcement activities.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### Panelists:

#### **Jerker Rydén**

National Library of Sweden, Stockholm

#### **Martin Schaefer**

Boehmert & Boehmert, Berlin

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 25 minutes (speakers, panelists and members of the audience)**

## **Break**

12:20 PM – 12:30 PM

## ***3B. Artificial Intelligence***

Thursday 12:30 PM – 1:40 AM (70 minutes)

### Moderator:

#### **Annsley Merelle Ward**

Wilmer Cutler Pickering Hale and Dorr LLP, London

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

### Speakers:

#### **Stephen Burley**

Federal Court of Australia, Sydney

#### ***Commissioner of Patents v. Thaler***

In the Australian *Thaler* decision [2022] FCAFC 62 (delivered last week) a Full Court of the Federal Court decided that an “inventor” must, for the purpose of the Patents Act, be human. That ruled out DABUS. The decision turned on the language of the Australian Patents Act. It is instructive to look at the reward structure that underpins patent legislation in general and how it came to be that it is human inventorship that lies at the root of title to subsequent ownership of a patent. The need for a discussion about potential change in the face of artificial intelligence is undeniable, but that is not the role of the Courts, but the legislature. Valid topics for discussion include whether any legislative change is required and, if so, what?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Colin Birss**

UK Court of Appeal, London

#### ***AI Inventors – What Is All the Fuss About?***

Applications for patents for inventions created by an artificial intelligence machine called Dabus have been recently considered by Patent Offices and Courts around the world. The case came before the Court of Appeal of England and Wales in 2021. The Dabus applications raise a number of issues, such as: Can a machine be an inventor? What is the role of the Patent Office in examining these applications? Who owns the patents for these inventions? This presentation will try to answer these questions in the context of UK law.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Sasha Rosenthal-Larrea**

Cravath, Swaine & Moore LLP, New York

***Patenting Inventions Related to Artificial Intelligence***

What is distinctive about Artificial Intelligence? Understanding how intellectual property can be used to protect AI will be key in ensuring AI innovators remain incentivized to develop new transformative technologies and integrate those technologies into products that improve human lives. This presentation will explore the hurdles facing inventors seeking to obtain patent protection for AI, addressing issues surrounding eligibility, novelty and the “PHOSITA” standard, as well as what intellectual property protections are available to AI implementers to protect proprietary data, which may be a key source of value.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Suzanne Wilson**

U.S. Copyright Office, Washington, D.C.

***Artificial Intelligence, U.S. Copyright, and Human Authorship***

No one disputes that copyright law protects human authorship. In the U.S., the courts have denied copyright protection for works alleged to have been created by a celestial beings and animals. Because a work alleged to have been authored solely by a machine or computer process is also non-human expression, it is ineligible for US copyright protection.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**John Lee**

Gilbert + Tobin, Sydney

**Helen Conlan**

Mishcon de Reya LLP, London

(Panelists have no individual time allocated; they take part in the discussions.)

**General discussion: 15 minutes (speakers, panelists and members of the audience)**

**Break**

1:40 PM – 1:50 PM

### ***3C. Copyright Potpourri***

Thursday 1:50 PM – 3:00 PM (70 minutes)

#### Moderator:

##### **Ron Lazebnik**

Fordham University School of Law, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

#### Speakers:

##### **Sean M. O’Connor**

Antonin Scalia Law School, George Mason University, Arlington

##### ***In the Court of TikTok: Are Fan Mashups That Call Out Copying Changing Music Writing Credits?***

Substantial similarity song call-outs have become a trend on TikTok and elsewhere. Influencers create and show their reactions to mashups of the latest hit release to sound like an earlier song. Writing credits were later added to Olivia Rodrigo’s 2021 hit *good4u* for the Paramore songwriters whose 2007 hit *Misery Business* was virally mashed up with it. An anonymous source claimed the parties were in touch before *good4u*’s release. But the credits were not added till months afterwards—after the trend had peaked. At the same time, TikTok and other platforms’ algorithms seem to respond well to these copy callouts—perhaps incentivizing influencers to focus on the trend in a positive feedback loop that promises even more scrutiny of any new hit for copying.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

##### **Mehdi Ansari**

Sullivan & Cromwell LLP, New York

##### ***Emerging Trends in NFTs***

Non-fungible tokens have had a meteoric rise in the past few years. This presentation will provide a brief introduction to NFTs, and then discuss legal issues (in particular IP issues) that arise in the context of NFTs.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

##### **Fiona Phillips**

Fiona Phillips Law, Sydney

##### ***New Copyright “Access” Reforms in Australia: Lost in Translation?***

In December 2021 the Australian Government released the *Copyright Amendment (Access Reform) Bill 2021* for consultation. The Bill represents the last phase of the Government’s Copyright Modernization process. The Bill purports to establish a regime to deal with orphan works, create a new fair dealing for quotation exception and update some of the other exceptions and statutory licenses in the *Copyright Act 1968*. On examination, the Bill goes way beyond the Government’s stated policy intention and raises some worrying questions for Australia’s compliance with its international treaty obligations.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Nicholas Bartelt**

U.S. Copyright Office, Washington, D.C.

***Thin Copyright at 30***

In 1991, the U.S. Supreme Court outlined a heightened standard for assessing infringement of works possessing limited creativity, only protecting so-called “thin” copyrights against “virtually identical” copying. This standard for factual compilations, such as the phonebook in *Feist*, has since evolved to define the scope of protection for original selection and arrangement of other types of uncopyrightable “building blocks” that are fundamental to creative expression, such as common shapes, designs, and musical elements. This talk looks at how the courts, in analyzing substantial similarity, and the Copyright Office, in assessing copyrightability, have recently applied this standard to protect original expression while not impeding other authors from using creative raw materials.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Ann Bartow**

University of New Hampshire, School of Law, Concord

**Mitch Glazier**

Recording Industry Association of America (RIAA), Washington, D.C.

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 15 minutes (speakers, panelists and members of the audience)**

**Session 4: TRADEMARK LAW**

**Concurrent Session**

Thursday, 11:25 AM - 3:00 PM

## ***4A. EU Trademark Law Update***

Thursday 11:25 AM – 12:25 PM (60 minutes)

### Moderator:

#### **Sven Schonhofen**

Reed Smith LLP, Munich

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

### Speakers:

#### **James Nurton**

IP Writer/Editor, London

##### ***Updates in EU Trademark Case Law***

CJEU and EU General Court highlights: We will take a look at some of the most interesting trademark judgments from Luxembourg in the past year. Topics addressed will include: pushing the boundaries of trademark protection, what constitutes genuine use and the unresolved issues in the Brexit Withdrawal Agreement. Sweets, treats, luxury and lots of food for thought guaranteed!

**(up to 10 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Paolo Catalozzi**

Supreme Court of Italy, Rome

##### ***Public Order and Morality as Ground of Trademark Registration Refusal in the EU and Freedom of Expression: Where Are We Going?***

According to European legislation, trademarks which are contrary to public policy or to accepted principles of morality cannot be registered and, if registered, shall be liable to be declared invalid. Public policy and morality are concepts that refers to principles and values to which a society adheres at a given time and, as such, are likely to change over time and vary in space. The talk will focus on the interpretation and application of these concept by European courts and the possible interference with the freedom of expression and try to predict future developments in the case-law.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Joel Smith**

Hogan Lovells International LLP, London

##### ***Bad Faith - Why Sky v. SkyKick Is a Peculiarly British Challenge?***

This case has paralyzed trademark practice, both in terms of prosecution strategy, but also active enforcement given the potential for counterclaims for invalidity. The issue concerns whether trademarks filed with broad specifications may be liable to be declared invalid (wholly or partly) on grounds that they were filed in bad faith. Does pure lack of intention to use equate to bad faith? Is dishonesty required with an intention to block a competitor or evergreen? What if the applicant has a mixed motive when it files the application? Finally, after 8 earlier judgments, we have the Court of Appeal's decision from July 2021. The Court of Appeal found in favor of Sky and reversed the finding that part of its trademark specifications were invalid on the basis of bad faith. It held that Sky had a substantial present trade and a future expectation of trade in relation to the goods and services in question. The door has been left open to a challenge based upon bad faith, but only in very exceptional circumstances.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Gordon Humphreys**

European Intellectual Property Office, Alicante

**Peter Ruess**

ARNOLD RUESS, Düsseldorf

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 15 minutes (speakers, panelists and members of the audience)**

**Break**

12:25 PM – 12:35 PM

## ***4B. The Functionality Doctrine in Disarray?***

Thursday 12:35 PM – 1:40 PM (65 minutes)

Moderator:

**Marshall Leaffer**

Maurer School of Law, Indiana University, Bloomington

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Mark A. Lemley**

Stanford Law School, Stanford  
***The Functionality Doctrine under US Law***  
(up to 10 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Gordon Humphreys**

European Intellectual Property Office, Alicante

***Functionality in EU Trademark and Design law: Regulating Overlaps***

While shape marks are often refused registration for performing a technical function, they may have better prospects to be registered as designs. Beyond looking at practical examples of how functionality is assessed for trademarks and designs, consideration will also be given to why legislation and the case law set different standards for these IP rights.

(up to 10 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**David Stone**

Allen & Overy LLP, London

**Irene Calboli**

Texas A&M University School of Law, Fort Worth

**Jeffery A. Handelman**

Crowell & Moring LLP, Chicago

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 30 minutes (speaker, panelists and members of the audience)**

**Break**

1:40 PM – 1:50 PM

***4C. Is the Likelihood of Confusion Test Getting out of Hand?***

Thursday 1:50 PM – 3:00 PM (70 minutes)

One could argue that trademark law has taken the concept of confusion too far. This panel will explore whether the doctrine needs to be limited and if so, how this could be done. Aspects of the doctrine that have been under scrutiny include:

- Have trademark rights based on sponsorship confusion been expanded too broadly?

- Do we even need the pre-sale confusion anymore in the age of the sophisticated internet user? The Third Circuit recently found the doctrine to be viable while expressing limited enthusiasm, *Select Comfort Corp. v Baxter*, 996 F.3d 925 (3d Cir. 2021).
- Is it time to limit the likelihood of confusion theory for example by introducing a materiality requirement that courts use in deciding false advertising cases? Under this approach, trademark owners would be required to prove that the confusion caused by the challenged use is material to the purchasing decision of consumers.

Moderator:

**Anderson Duff**

Hogan Duff LLP, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Panelists:

**Daniel R. Bereskin**

Bereskin & Parr LLP, Toronto

**Irene Calboli**

Texas A&M University School of Law, Fort Worth

**Jeffery A. Handelman**

Crowell & Moring LLP, Chicago

**Rebecca Tushnet**

Harvard Law School, Cambridge

**Miguel Pérez**

M-IP Abogados, S.C., Mexico City

**Tobias Timmann**

Freshfields Bruckhaus Deringer LLP, Düsseldorf

**General discussion: 65 minutes (speakers, panelists and members of the audience)**

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## **Thursday Reception**

3:00 PM – 4:00 PM

Sponsored by:  
**Allen & Overy LLP**

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**Friday, April 22**

**Kickoff Session: What Will China's IP System Look Like in 5 Years?**

Friday 6:30 AM – 7:45 AM (75 minutes)

Moderator:

**He Jing**

Gen Law Firm, Beijing

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Michael-Yu Ding**

Quality Brands Protection Committee, Beijing

*How Multinational Companies Look at China's IP Policy Today?*

(up to 10 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Guobin Cui**

Tsinghua University School of Law, Beijing

*Latest Development in Pharmaceutical Patent Invalidation Cases in China*

Data supplementation was one of the decade-long issues in the pharmaceutical IP world. What does the latest case development tell us about the future? Will China take on a new standard supporting innovations?

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Zheng Ning Ms**

Communication University of China, Beijing

*China's Online Protection of Music and Movies*

China carried out very effective IP protection programs during the Winter Olympics. There were very few counterfeits of the popular mascot Bing Dun Dun and there was immediate dismissal of bad faith trademark applications copying the name of Eileen Gu. Is it a trend or special treatment?  
**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Yang Ming**

Peking University Law School, Beijing

#### ***Streaming Platforms' Copyright Control and Its Regulation***

Currently, streaming platforms apply copyright control to implement vertical integration strategies which raise competition law issues. How shall we evaluate the copyright control behaviors of streaming platforms under anti-monopoly law? And, except anti-monopoly law, are there other means of regulation within copyright?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Chi Xu**

Smooore Technology Limited, Shenzhen

#### ***How a China-Based Global Firm Designs and Executes IP Strategy***

China-based global firms are increasingly enforcing patents around the world. What are the strategic considerations on the choice of courts? How are they building patent portfolios?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**General discussion: 10 minutes (speakers, panelists and members of the audience)**

## **Session 5: PATENT LAW**

### **Concurrent Session**

Friday, 8:00 AM - 1:00 PM

### ***5A. Patent Prosecution and Litigation***

Friday 8:00 AM – 9:10 AM (70 minutes)

Moderator:

**Penny Gilbert**

Powell Gilbert LLP, London

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Kenneth R. Adamo**

Law Office of KRAdamo, Chicago

***Is It Possible to Steer Your US Litigation Towards a Particular Court, Judge and/or Jury?***

Far from being a pejorative, (proper) “forum shopping” is a U.S trial lawyer's primary responsibility and principal strategic and tactical step, after selection of targets, driving the commencement of litigation.

Cabined by basic statutory and rule constraints, counsel must gather information from a wide variety of sources, and then use that information and their experience to select a district court and decide whether to try their case to a jury. Also, and often most critically, those selections effect, in turn or in parallel, the “choice” of the judicial officer who will try the case, and whether a judge or magistrate judge is chosen.

This presentation will focus on how those matters interface. An overall selection decision methodology will be suggested, and several illustrated/problematic examples addressed.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Carl Josefsson**

European Patent Office (EPO), Haar

***The Boards of Appeal and the National Courts***

The European Patent Convention (EPC) is applied by the Boards of Appeal and, in parallel, by national courts of the contracting states. This presentation will address the relationship between the case law of the Boards of Appeal and the case law of national courts.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**David J. Kappos**

Cravath, Swaine & Moore LLP, New York

***Enhanced Damages in the Current No-Injunction Environment***

In *eBay, Inc. v. MercExchange, L.L.C.*, 546 U.S. 388 (2006), the U.S. Supreme Court departed from the longstanding principle that a patent owner is presumptively entitled to an injunction once it defends validity and demonstrates infringement. Under the post-*eBay*, “almost no injunction” regime, firms that are primarily users of patented

technology typically conclude that the expected net payoff from infringement and litigation exceeds the expected net payoff from negotiation and paying an up-front license fee. In other words, infringement becomes “efficient.” We propose that reasonable royalty damages must be enhanced in order to discourage opportunistic “efficient infringement” and to adequately provide full compensation.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Ronald E. Dimock**

Gowling WLG, Toronto

**Otto Licks**

Licks Attorneys, Rio de Janeiro

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 30 minutes (speakers, panelists and members of the audience)**

**Break**

9:10 AM – 9:15 AM

## ***5B. Patent Potpourri***

Friday 9:15 AM – 10:25 AM (70 minutes)

Moderator:

**Andrew Bowler**

Bristows LLP, London

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Michael Williams**

Gilbert + Tobin, Sydney

**Implied Licenses Exhausted Under Australian Patent Law: Assessing the Impact of the Adoption of Exhaustion on First Sale**

In *Calidad Pty Ltd v Seiko Epson Corporation* (2020) the High Court of Australia overturned over 100 years of law reliant on the doctrine of implied license, replacing it with the doctrine of exhaustion from US patent law. The decision has provided a fundamental reset of the concept of the ‘right of repair’ under Australian law and sparked a renewed policy focus amongst regulators and legislators on consumer rights

in patented products. This presentation will examine the decision and its implications, including for patentees and licensees.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Sepehr Shahshahani**

Fordham University School of Law, New York

***Measuring Follow-On Innovation***

How patents affect follow-on innovation is a key question for the patent system. Most of what economists consider follow-on innovation could not plausibly be affected by a patent because it is clearly not patent infringement. This complicates the interpretation of key results from the literature. This talk will provide simple guidelines for improved measurement of follow-on innovation and talk about an important recent study that I and Janet Freilich replicated using this improved measure.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Marleen H.J. van den Horst**

BarentsKrans, The Hague

***Cross-Border Preliminary Injunctions in the Netherlands – Recent Case Law and Developments***

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Ari Laakkonen**

Powell Gilbert LLP, London

***UK Infringement by Equivalents: The Role of Formstein***

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Simon Holzer**

Meyerlustenberger Lachenal AG, Zurich

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 15 minutes (speaker, panelists and members of the audience)**

## **Break**

10:25 AM – 10:35 AM

## ***5C. International Patent Developments***

Friday 10:35 AM – 11:50 AM (75 minutes)

### Moderator:

#### **Robin Jacob**

Lord Justice of Appeal of the Court of Appeal, London (retired); Faculty of Laws, University College London, London

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

### Speakers

#### **Peter Charleton**

The Supreme Court, Dublin, Ireland

#### ***Supplementary Protection Certificates - Extending Patent Protection in the EU by Administrative Action: Or Is it Something More?***

Special protection certificates in EU law extend the life of a patent for human and animal medicines for up to 5 years post patent protection of 20 years. But, in a series of cases, the Court of Justice of the European Union has apparently set its face against any SPC being granted unless, for a combination product, the claims on the patent explicitly mention that application or if this would be apparent to the person skilled in the art. Additionally, there is a series of cases from England & Wales, Finland and Ireland concerning what happens when a monotherapy of a patented drug obtains an SPC but the patent holder then applies for a combination therapy of the patented drug with one in the public domain. Is this possible? National laws and EU law seem to differ on this issue.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### **Brian Cordery**

Bristows LLP, London

#### ***Plausibility and Undue Burden – The Fibrogen v Akebia Ruling***

The concepts of plausibility and undue burden were threatening to spiral out of control in proceeding before the English Patents Court. In late summer 2021 the Court of Appeal handed down its ruling in *Fibrogen v Akebia* which espouses a different approach to assessing the plausibility of claims with structural and functional features. The difference in approach between Arnold LJ and Birss LJ on the issue is stark.

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**John Richards**

Ladas & Parry LLP, New York

***Plausibility***

The EPO Enlarged Board of Appeal is to consider when evidence to support patentability can be submitted after filing a patent application, thereby implicitly raising the question how much information needs to be included in the application to satisfy the requirement that the specification discloses an invention rather than a guess. This presentation looks at the development of EP and US laws on this topic and sets out issues for consideration in determining what the law “should” be.

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Heinz Goddar/Melanie Müller**

Boehmert & Boehmert, Munich

***2<sup>nd</sup> German Patent Modernization Act – On the Way to E-Bay-Scenario in Germany***

With the 2<sup>nd</sup> Patent Modernization Act of August 2021, Germany has introduced into its patent act a provision that in individual cases, according to good-phase-balancing, no “quasi-automatic” injunction would be granted to a patentee against an infringer, rather the patentee would “only” get monetary compensation. How to calculate such “compensation” is presently under discussion. Also, the 2<sup>nd</sup>Modernization Act is supposed to harmonize the timelines for patent invalidation and litigation procedures but some questions insofar are still under discussion and open, particularly with regard to the presently not existing possibility for defendants in patent litigation to file an invalidation action against German patents during opposition period or while a procedure is pending.

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Eva Ehlich**

Maiwald, Munich

**Kevin McGough**

BioNTech, Cambridge

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 20 minutes (speaker, panelists and members of the audience)**

**Break**

11:50 AM – 12:00 PM

**5D. PTAB**

Friday 12:00 PM - 1:00 PM (60 minutes)

Moderator:

**John B. Pegram**

Fish & Richardson, P.C., New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Adam Mossoff**

Antonin Scalia Law School, George Mason University, Arlington

***Leviathan and Innovation: The Administrative State Assimilates the Patent System***

The Supreme Court’s decision in *U.S. v Arthrex* is significant for many reasons, and one of these is that it represents the final decision by the Court that the PTAB and the processes by which it cancels patents will be assessed by courts according to the existing discretionary norms of administrative agencies and agency tribunals generally that are accorded deference. This represents a fundamental sea change in the patent system, and it reinforces the importance of statutory reform of the PTAB’s practices to hardwire into the PTAB prohibitions on panel stacking, serial petitioning, and other practices that raise due process and related rule-of-law concern.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Patricia A. Martone**

NYU Law Engelberg Center on Innovation Law & Policy, New York

***The USPTO’s Resistance to Following the Arthrex Decision Imperils the Constitutionality of All AIA Review Decisions***

In June of 2021, the Supreme Court in *Arthrex* ruled that PTAB judges issuing final decisions in AIA reviews were “inferior officers” and that the Constitution required that their decisions “must be subject to review by the Director [of the United States Patent and Trademark Office].”

Many months later the review procedure implemented by the USPTO is overseen by an inferior officer and has not been the subject of formal rulemaking. The USPTO's stance undermines the rule of law and public confidence in and respect for the USPTO.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Brian Scarpelli**

ACT | The App Association, Washington, D.C.

#### ***Small Business Tech Perspectives on PTAB and Discretionary Denial***

***Developments*** Through a series of precedential Patent Trial and Appeal Board decisions and policies in recent years, the U.S. Patent and Trademark Office has shifted the inter partes review (IPR) process away from Congress' goals in the America Invents Act, allowing invalid patents to remain unchallenged. American small business innovators are particularly affected by these PTO policies that shield invalid patents from review. There are, however, steps that can and should be taken to move the PTAB back to restore the IPR system to focus on addressing invalid, yet still issued, patents.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

#### Panelists:

#### **George E. Badenoch**

Hunton Andrews Kurth LLP, New York

#### **Brian P. Murphy**

Haug Partners LLP, New York

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 20 minutes (speaker, panelists and members of the audience)**

## **Session 6: COPYRIGHT LAW & COMPETITION LAW**

### **Concurrent Session**

Friday, 8:00 AM - 1:00 PM

### ***6A. Fair Use***

Friday 8:00 AM – 9:10 AM (70 minutes)

Moderator:

**Ron Lazebnik**

Fordham University School of Law, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**Daan G. Erikson**

Husch Blackwell LLP, Chicago

***Fair Use After Google v. Oracle***

In holding Google’s use of Oracle’s software code was fair use as a matter of law, the U.S. Supreme Court issued its first opinion on fair use since the 1994 decision *Campbell v. Acuff-Rose*. Among other notable points in *Google v. Oracle*, the majority analyzed the fair use factors out of order starting with the second factor, held that Google’s use was transformative because it used the code “in a distinct and different computer environment” (to develop smartphones rather than desktops or laptops), highlighted how much of the code Google did not copy, and focused on the effect on the market rather than the effect on the potential market. Have lower courts adopted or ignored these unorthodox aspects of the Supreme Court’s latest edict on fair use?

**(up to minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Jane C. Ginsburg**

Columbia Law School, New York

***Andy Warhol, Transformative Use and Fair Use - Where Are We Going?***

The Second Circuit’s decision in *Andy Warhol Foundation v. Goldsmith* retreats both from its prior caselaw’s generous characterization of artistic reuse as “transformative,” and from the outcome-determinacy of a finding of “transformativeness.” The decision suggests both that courts may be applying a more critical understanding of what “transforms” copied content, and that courts may be reforming “transformative use” to reinvigorate the other statutory factors, particularly the inquiry into the impact of the use on the potential markets for or value of the copied work. The court also provided an important explanation of copyrightable authorship in photographs. The Second Circuit’s decision in *Andy Warhol Foundation v. Goldsmith* also addresses the relevance to transformative use of the Supreme Court’s ruling in *Google v. Oracle*; the Second Circuit declined to extend the Supreme Court’s fair use analysis beyond the context of functional code far from the “core of copyright.”

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Joseph C. Gratz**

Durie Tangri LLP, San Francisco

***Controlled Digital Lending: Can Fair Use Bring Traditional Library Lending Into the Digital Age?***

Copyright has never prevented United States libraries from lending copyrighted books to one patron at a time for each copy the library owns. Traditionally, that lending involved the physical transfer of particular copies, so no fair use question arose. Controlled Digital Lending – technology that permits a library to digitally lend the print books it owns – allows libraries to continue to lend the books they bought to their patrons one at a time, even as those patrons increasingly want to borrow books digitally. Four major publishers sued Internet Archive, a nonprofit library that practices Controlled Digital Lending, for copyright infringement. That case is pending in the Southern District of New York.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Brian W. Gray**

Brian Gray Law, Toronto

**Bhamati Viswanathan**

Emerson College, Boston

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 30 minutes (speakers, panelists and members of the audience)**

**Break**

9:10 AM – 9:15 AM

***6B. Copyright Protections for Publishers***

Friday 9:15 AM – 10:15 AM (60 minutes)

Moderator:

**Ted Shapiro**

Wiggin LLP, London

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**Kimberley Isbell**

U.S. Copyright Office, Washington, D.C.

***Protections for Press Publishers: International Approaches and Domestic Considerations***

This talk will discuss the United States Copyright Office's upcoming report on protections for press publishers. Included will be an overview of different international approaches to protections for press publishers, including the creation of ancillary copyright protections in the European Union and competition approaches adopted in Australia, as well as a discussion of information gathered by the Office during the public comment period and public roundtables.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Danielle Coffey**

News Media Alliance, Arlington

***Protection of Journalism in the U.S.***

Copyright protections are intended to ensure a return on investment in creative works. It is important for the government and the courts to clarify and strongly enforce those protections with regard to quality journalism that requires investment in reporters and newsrooms. However, with monopolies that distribute news content, a copyright protection is only as valuable as the ability to assert the right. In this case, competition law addresses such marketplace failure.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Ali Sternburg**

Computer & Communications Industry Association, Washington, D.C.

***Why a Snippet Tax Would Violate the First Amendment and International Obligations***

Subsidies to press publishers adopted abroad, often in the form of "snippet taxes" that are sui generis or "ancillary" rights, are inconsistent with international copyright obligations that prohibit nations from restricting quotation of published works.

Adopting the European Union ancillary right in the United States would be not only undesirable but also impossible within the U.S. legal framework, given the constitutional underpinnings of the U.S. copyright system and its inherent limits on protectable subject matter. The U.S. should not follow the example of recent international initiatives which are based on flawed understanding of market dynamics between online news content and online aggregators, and in the case of Australia, narrowly targeted to apply to just two U.S. firms.

(up to 6 minutes)

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Jan Bernd Nordemann**

Nordemann, Berlin

**Carlo Scollo Lavizzari**

Lenz Caemmerer, Basel

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 20 minutes (speakers, panelists and members of the audience)**

**Break**

10:15 AM – 11:25 AM

## ***6C. FRAND***

Friday 10:25 AM – 11:40 AM (75 minutes)

Topics covered include anti-suit injunctions (including recent political activities like the European Commission's complaint to the WTO and the US "Defending American Courts Act"), licensing level and recent developments, patent pools and licensing negotiation groups, SEPs and antitrust law: hold-out vs. hold-up and the level-playing field, the various surveys e.g. by DOJ, European Commission.

Moderator:

**Cordula Schumacher**

ARNOLD RUESS, Düsseldorf

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Panelists:

**Jorge L. Contreras**

The University of Utah, College of Law, Salt Lake City

**Steven Geiszler**

Huawei, Dallas

**David Por**

Allen & Overy, Paris

**Jyh-An Lee**

The Chinese University of Hong Kong, Hong Kong  
**Steve Akerley**

InterDigital, Inc., Wilmington, Delaware

**Wolrad Waldeck**

Freshfields Bruckhaus Deringer LLP, Düsseldorf

(Panelists have no individual time allocated; they take part in the session discussion.)

**Session discussion: 70 minutes (speakers, panelists and members of the audience)**

**Break**

11:40 AM – 11:50 AM

## ***6D. U.S. Copyright Developments***

Friday 11:50 AM – 1:00 PM (70 minutes)

Moderator:

**Michael S. Shapiro**

U.S. Patent and Trademark Office (USPTO), Alexandria

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**David O. Carson**

U.S. Copyright Office, Washington, D.C.

***The Copyright Claims Board is About to Open its Doors***

The Copyright Claims Board (CCB), a three-member tribunal within the Copyright Office, was established by the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act). The CCB will serve as a voluntary alternative to federal court that provides an efficient, streamlined way to resolve copyright disputes involving claims seeking damages of up to \$30,000. For more than a year, the Office has been in the process of developing the CCB by engaging in a number of rulemakings, setting up an electronic filing and case management system, hiring staff, and developing educational materials to assist users in navigating the system. The CCB will open its virtual doors in a few weeks. In the presentation, a member of the CCB will explain what users can expect and provide insights into the implementation process.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Kevin Amer**

U.S. Patent and Trademark Office (USPTO), Alexandria

***Unicolors v. H&M Hennes & Mauritz: When Is a Registration Inaccuracy Provided “Knowingly”?***

This talk will consider the Supreme Court’s recent decision in *Unicolors v. H&M Hennes & Mauritz*, which construed the Copyright Act’s safe harbor for copyright holders who include inaccurate information in a registration application. The Court held that the safe harbor applies regardless of whether the inaccuracy is based on a factual or legal error. This presentation will discuss the Court’s opinion and explore potential implications for future cases.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Joshua L. Simmons**

Kirkland & Ellis LLP, New York

***Are We All Textualists Now? “Communicating” a “Display” to the “Public”***

In 2007, the Ninth Circuit adopted the so-called “server test,” which requires a defendant to store a copy of a work to display it publicly under the Copyright Act. The Ninth Circuit purported to offer a textualist reading of the statute. In recent years, however, courts in Texas and New York have rejected the server test, finding it inconsistent with the Copyright Act’s text as well as the Supreme Court’s intervening decision in *American Broadcasting Cos. v. Aereo, Inc.* This discussion will focus on the Copyright Act’s text, as well as the growth of online images and whether its ubiquity has changed judicial views of such technologies.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Jennifer Pariser**

Motion Picture Association, Washington D.C.

**Sandra Aistars**

Antonin Scalia Law School, George Mason University, Arlington

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 30 minutes (speakers, panelists and members of the audience)**

## **Session 7: COMPETITION, TWO CONCURRENT SESSIONS & TRADEMARK LAW**

### **Concurrent Session**

Friday, 8:00 AM - 1:15 PM

### ***7A. Antitrust: Developments and Trends***

Friday 8:00 AM – 9:10 AM (70 minutes)

Topics covered: Does antitrust control of big tech help or hurt innovation? Tech platforms + AI + blockchain: Is antitrust keeping up? Root and branch reconstruction of antitrust law: What should IP attorneys know? Chinese and European developments: Lessons for the US.

#### Moderator:

#### **Daryl Lim**

UIC School of Law, Chicago

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

#### Panelists:

#### **Damien Geradin**

Geradin Partners, Brussels

#### **William E. Kovacic**

The George Washington University Law School, Washington, D.C.

#### **Thomas B. Nachbar**

University of Virginia, School of Law, Charlottesville

#### **Thibault Schrepel**

Amsterdam Law & Technology Institute, VU Amsterdam University, Amsterdam;  
Stanford University's CodeX Center, Stanford

#### **Angela Zhang**

University of Hong Kong, Faculty of Law, Hong Kong

#### **Eleonor M. Fox**

New York University, New York

(Panelists have no individual time allocated; they take part in the session discussion.)

**Session discussion: 65 minutes (speakers, panelists and members of the audience)**

#### **Break**

9:10 AM – 9:15 AM

## ***7B. Multilateral Developments***

Friday 9:15 AM – 10:25 AM (70 minutes)

Moderator:

### **Michele Woods**

World Intellectual Property Organization (WIPO), Geneva  
(up to 5 minutes to introduce the subject matter; intro of speakers –  
just name and affiliation, please see bios in print materials and online.)

Speakers:

### **Steven Tepp**

Sentinel Worldwide, Washington D.C.

#### ***What Is the Future of Global IP Norm-Setting?***

The expansion of global IP norm-setting into the WTO was designed to advance IP standards and improve compliance with international obligations. Those have been hindered by the rise of short-term approaches to trade balances and development, as well as disputes over the role of the Appellate Body. Most recently, some have argued that in order to save TRIPS we must waive it. And now Russia is moving further and further out of the global system. What does this say about the WTO's ability to meet its expectations and remain relevant to IP norm-setting in the future?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Annabelle Bennett**

Federal Court of Australia, Sydney (retired); Bond University, Robina, Queensland

#### ***Have Changes Brought About Changes in Judging?***

It goes without saying that there have been many changes and developments in the way in which cases can be conducted and in the technologies being judged. There are also developments in public approaches to IP. Does this have an effect on Judges? Should it affect Judges? Does it or should it differ from jurisdiction to jurisdiction?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **F. Scott Kieff**

Kieff Strategies LLC, Washington, D.C.

#### ***IP Causes of Action in Trade Tribunals***

With so much conflict in global security and trade systems, lawyers and business leaders often want options. This talk will explore some relatively simple causes of

action from the field of IP that can be used to good effect in tribunals more often focused on trade regulation.  
**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Michele Woods**

World Intellectual Property Organization (WIPO), Geneva

***Copyright Update from WIPO***

The last two years have not been at all what we expected the last time we were gathered in person. How has the copyright agenda at WIPO been affected by the changes in the circumstances surrounding multilateral discussions? Given this new multilateral context, what can we expect in the near future?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Paul Maier**

European Union Intellectual Property Office, Alicante

(Panelists have no individual time allocated; they take part in the discussions.)

**General discussion: 15 minutes (speakers, panelists and members of the audience)**

**Break**

10:25 AM – 10:35 AM

***7C. Trade Secrets***

Friday 10:35 AM – 11:40 AM (65 minutes)

Moderator:

**Victoria A. Cundiff**

Paul Hastings LLP, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Speakers:

**Camilla Alexandra Hrdy**

University of Akron, School of Law, Akron

***The Value in Secrecy***

This talk will discuss trade secret law's elusive “independent economic value” requirement. Many commentators assume any secrets that end up in court as the subject of trade secret litigation have economic value. Why else would the plaintiff have bothered to keep the information secret, and why else would the parties be arguing over the right to use or disclose it? This talk challenges that assumption and discusses recent court opinions dismissing trade secret claims for failure to satisfy independent economic value in a variety of circumstances.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **Max Haedicke**

Albert-Ludwigs-Universität Freiburg, Freiburg

#### ***Protection of Trade Secrets in German Patent Litigation***

Since 2021, the German Patent Act allows for the protection of trade secrets in patent infringement proceedings. The new provisions change the landscape of German patent litigation and may possibly align the scope of protection of trade secrets in patent proceedings to the level of protection granted in other jurisdictions.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### **James Pooley**

James Pooley, A Professional Law Corporation, Menlo Park, California

#### ***Compliance With the “Reasonable Efforts” Element of Trade Secrecy***

There has always been a dimension of expected self-help in trade secret law, with the owner expected to exercise “reasonable efforts” to prevent loss of control. Under the Restatement of Torts it was a suggestion, but under the UTSA and DTSA it is a requirement, and one that courts are enforcing more strictly than in the past. This presentation addresses how trade secret owners can prepare to meet the standard in enforcement proceedings, and how defendants can spot and prove meaningful failures. It will focus on the need for analysis that considers the specific trade secrets alleged to have been misappropriated.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

### Panelists:

#### **Thomas D. Pease**

Quinn Emanuel Urquhart & Sullivan LLP, New York

#### **Mark F. Schultz**

University of Akron, School of Law, Akron

(Panelists have no individual time allocated; they take part in the discussions.)

**General discussion: 25 minutes (speakers, panelists and members of the audience)**

**Break**

11:40 AM – 11:50 AM

***7D. U.S. Trademark Law Developments***

Friday 11:50 AM - 1:00 PM (70 minutes)

Moderator:

**Matthew D. Asbell**

Offit Kurman, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios online.)

Speakers:

**Marshall Leaffer**

Maurer School of Law, University of Indiana, Bloomington

***US Trademark Case Law Update, Including the Status of the Well-Known Marks Doctrine in the US***

Article 6bis of the Paris Convention requires the cancellation of a registration or the use of a mark, by a third party that is identical or similar to the well-known mark if used on identical goods even though the trademark owner has not used or registered the mark in the jurisdiction. The United States has never formally adopted the “well Known” marks doctrine of 6bis, even though some US case law has given what seems to be its *de facto* recognition. This talk will discuss the status of the well-known mark’s doctrine in the United States and will focus on *The Coca-Cola Co. v. Meenaxi Enterprise, Inc.*, 92063353 (T.T.A.B. Jun. 28, 2021, in which the Trademark Trial and Appeal Board, in what it has termed a precedential opinion, has reaffirmed the trend by US courts in providing *de facto* recognition of the doctrine.

**(up to 10 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Jennifer Simmons**

International Trademark Association (INTA), Washington, D.C.

***The Trademark Modernization Act – Expungement and Reexamination Proceedings***

This talk will provide remarks on the implementation of the Trademark Modernization Act, with a special focus on the expungement and reexamination proceedings. It will explore INTA’s advocacy on both the legislation and the USPTO

rules implementing the law, as well as how the rules are working in practice. It will also discuss practical tips for filing petitions and current statistics regarding the proceedings.

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Rebecca Tushnet**

Harvard Law School, Cambridge

***The SHOP SAFE Act***

SHOP SAFE promises to create a new kind of secondary liability for internet platforms. How does it differ from existing regimes, and what are the relevant interpretive challenges?

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

**Gerald M. Levine**

Levine Samuel LLP, New York

***Reclaiming Stolen Domain Names under the Anti-Cybersquatting Consumer Protection Act***

**(up to 6 minutes)**

**Discussion: 5 minutes (speakers, panelists and members of the audience)**

Panelists:

**Maria A. Scungio**

Robinson & Cole LLP, New York

(Panelists have no individual time allocated; they take part in the general discussion.)

**General discussion: 15 minutes (speaker, panelists and members of the audience)**

**Break**

1:00 PM – 1:15 PM

***1C. Views from the Judiciary***

Friday 1:15 PM – 3:00 PM (105 minutes)

Moderator:

**Hugh C. Hansen**

Fordham University School of Law, New York

(up to 5 minutes to introduce the subject matter; intro of speakers – just name and affiliation, please see bios in print materials and online.)

Panelists:

**Richard Arnold**

UK Court of Appeal, London

**Colin Birss**

UK Court of Appeal, London

**Stephen Burley**

Federal Court of Australia, Sydney

**Paolo Catalozzi**

Supreme Court of Italy, Rome

**Peter Charleton**

The Supreme Court, Dublin, Ireland

**Klaus Grabinski**

Federal Court of Justice, Karlsruhe

**Simon Holzer**

Swiss Federal Patents Court, St. Gallen; Meyerlustenberger Lachenal AG, Zurich

**Gordon Humphreys**

Boards of Appeal, European Union Intellectual Property Office, Alicante

**Robin Jacob**

Court of Appeal, London (retired); Faculty of Laws, University College London, London

**Carl Josefsson**

European Patent Office, Haar

**Rian Kalden**

Court of Appeal of The Hague, The Hague

**F. Scott Kieff**

Former Commissioner, U.S. International Trade Commission; Kieff Strategies LLC, Washington D.C.

**Kathleen M. O'Malley**

U.S. Court of Appeals for the Federal Circuit, Washington, D.C. (retired)

**Paul R. Michel**

U.S. Court of Appeals for the Federal Circuit, Washington, D.C. (retired)

**Pauline Newman**

U.S. Court of Appeals for the Federal Circuit, Washington, D.C.