

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, 2021
(online)**

**Hugh C. Hansen
Director**

Learn Debate Have Fun

CONFERENCE PROGRAM

Thursday, April 21

Welcoming Remarks:

Thursday 8:00 AM – 8:15 AM

Hugh C. Hansen

Fordham University School of Law, New York

Matthew Diller

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 – 9:35 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:

António Campinos

European Patent Office (EPO), Munich
(up to 7 minutes)

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

Shira Perlmutter

U.S. Copyright Office, Washington, D.C.
(up to 7 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 7 minutes)

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

Antony Taubman

World Trade Organization (WTO), Geneva

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

(up to 7 minutes)

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

Panelists:

TBA

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

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

Break

9:35 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

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

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 7 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 7 minutes)

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

He Jing

Gen Law Firm, Beijing

(up to 7 minutes)

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

TBA

Panelists:

TBA

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

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, 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

Update on the Unified Patent Court

(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 7 minutes)

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

Panelists:

Myles Jelf

Bristows LLP, London

Miquel Montaña

Clifford Chance LLP, Barcelona

TBA

(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

(up to 7 minutes)

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

Catherine Fitch

Merck & Co., Inc., Kenilworth, New Jersey
(up to 7 minutes)

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

Justin Hughes

Loyola Law School, Los Angeles
(up to 7 minutes)

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

Panelists:

TBA

(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

TBA

(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 – 12:25 PM (70 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 7 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 7 minutes)

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

Lauri Rechardt

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 harbours). 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 7 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: 30 minutes (speakers, panelists and members of the audience)

Break

12:25 PM – 12:35 PM

3B. Artificial Intelligence

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

Moderator:

Annsley Merelle Ward

WilmerHale 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

(up to 7 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 7 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 7 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: 25 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

(up to 7 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 7 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 2022 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 7 minutes)

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

Panelists:

TBA

(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 4: TRADEMARK LAW

Concurrent Session

Thursday, 11:25 AM - 3:00 PM

4A. EU Trademark Law Developments

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

Moderator:

Sven Schonhofen

Reed & Smith, 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

(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 7 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 7 minutes)

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

Panelists:

Gordon Humphreys

European Intellectual Property Office, Alicante

Tobias Timmann

Freshfields, Düsseldorf

TBA

(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

4B. The Functionality Doctrine in Disarray?

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

Moderator:

Marshall Leaffer

Maurer School of Law, University of Indiana, Bloomington

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

Speakers:

Mark 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

The Functionality Doctrine under EU Law

(up to 10 minutes)

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

Panelists:

David Stone

Allen & Overy LLP, London

TBA

(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)

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

Peter Ruess

ARNOLD RUESS, Düsseldorf

Rebecca Tushnet

Harvard Law School, Boston

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

Thursday Reception

3:00 PM – 4:00 PM

Sponsored by:

Allen & Overy LLP

Friday, April 22

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

(up to 7 minutes)

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

Carl Josefsson

European Patent Office, 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 7 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.*, 547 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 7 minutes)

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

Panelists:

Ronald E. Dimock

Gowling WLG, Toronto

TBA

(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:

Christopher Floyd

Lord Justice of Appeal of the Court of Appeal, London (retired)

A Tale of Two Supreme Courts

In the *Occlusion Device* case in the German Supreme Court (Decision of 10 May 2000 – Case No X ZR 16/09) it was held that, if the description in a patent contains a number of ways in which the specific technical effect can be achieved, but then only claims one of them, the use of the other ways does not, as a rule, constitute an infringement of the patent even under the doctrine of equivalents. By contrast, in *Actavis v Eli Lilly* [2017] UKSC 48 the United Kingdom Supreme Court held that there could be infringement by equivalence of a claim which is limited to one way of achieving the technical effect when the skilled person would be confident from the common general knowledge that the effect could be achieved in other ways which the patentee had chosen not to claim. Whilst the two cases can be reconciled (statement in

description as opposed to common general knowledge), is that distinction an acceptable one to make?

(up to 7 minutes)

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

Michael Williams

Gilbert + Tobin, Sydney

(up to 7 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 7 minutes)

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

Marleen van den Horst

BarentsKrans, The Hague

(up to 7 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: 20 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

(up to 7 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 7 minutes)

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

John Richards

Ladas & Parry LLP, New York

(up to 7 minutes)

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

Heinz Goddar/Melanie Müller

Boehmert & Boehmert, Munich

2nd German Patent Modernization Act – On the Way to E-Bay-Scenario in Germany

With the 2nd 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 2nd 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 7 minutes)

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

Panelists:

Rian Kalden (invited)

Court of Appeal of the The Hague, The Hague

(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

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 7 minutes)

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

Patricia 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 rule making. The USPTO’s stance undermines the rule of law and public confidence in and respect for the USPTO.

(up to 7 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 7 minutes)

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

Panelists:

George E. Badenoch

Hunton Andrews Kurth LLP, New York

TBA

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

General discussion: 30 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:

Courtney Cox

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 Erikson

Husch Blackwell LLP, Chicago

Fair Use After Google v. Oracle

(up to 7 minutes)

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

Jane 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 7 minutes)

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

TBA

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 7 minutes)

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

Mary E. Rasenberger (invited)

The Authors Guild, New York
(up to 7 minutes)

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

Ali Sternburg

Computer & Communications Industry Association, Washington, D.C.
(up to 7 minutes)

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

Panelists:

Jan Bernd Nordemann

Nordemann, Berlin

(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)

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 Technologies, USA, Inc., Plano

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, 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.

(up to 7 minutes)

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

Kevin Amer

U.S. Patent and Trademark Office, Alexandria
(up to 7 minutes)

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

Joshua L. Simmons

Kirkland & Ellis LLP, New York
(up to 7 minutes)

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

Panelists:

TBA

(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: AI and Digital Platforms

Friday 8:00 AM – 9:10 AM (70 minutes)

Topics covered include tech platforms; updates on legislative reform and agency activity; AI, blockchain, and antitrust; key Chinese/European developments.

Moderator:

Daryl Lim

UIC John Marshall Law School, 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 (invited)

University of Virginia, School of Law, Charlottesville

Thibault Schrepel

Utrecht University, Utrecht; 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 (invited)

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 7 minutes)

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

Annabelle Bennett

Former Judge of the Federal Court of Australia, Sydney; Bond University, Robina,
Queensland

(up to 7 minutes)

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

F. Scott Kieff

Kieff Strategies LLC, Washington, D.C.

(up to 7 minutes)

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

Panelists:

Paul Maier

European Intellectual Property Office, Alicante

TBA

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

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

Break

10:25 AM – 10:35 AM

7C. Trade Secrets

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

Moderator:

Victoria A. Cundiff

(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 7 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 7 minutes)

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

TBA

Panelists:

TBA

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

General discussion: 20 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
(up to 10 minutes)

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

Jennifer Simmons

International Trademark Association (INTA), New York
The Trademark Modernization Act – Expungement and Reexamination Proceedings
(up to 7 minutes)

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

Rebecca Tushnet

Harvard Law School, Boston
The Shop Safe Act
(up to 7 minutes)

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

Gerald M. Levine

Levine Samuels LLP, New York
Reclaiming Stolen Domain Names under the Anti-Cybersquatting Consumer Protection Act
(up to 7 minutes)

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

Panelists:

TBA

(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

Annabelle Bennett

Former Judge of the Federal Court of Australia, Sydney; Bond University, Robina, Queensland

Colin Birss (invited)

UK Court of Appeal, London

Stephen Burley

Federal Court of Australia, Sydney

Paolo Catalozzi

Supreme Court of Italy, Rome

Christopher Floyd

Lord Justice of Appeal of the Court of Appeal, London (retired)

Klaus Grabinski

Federal Court of Justice, Karlsruhe

Lennie Hoffman (invited)

Second Senior Lord of Appeal in Ordinary; Queen Mary University of London, London (retired)

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

Lord Justice of Appeal of the 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 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.

Paul R. Michel

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

Pauline Newman

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