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Intellectual Property Perspectives: Spring 2011

IP Law Program
George Washington University

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**INTELLECTUAL PROPERTY
PERSPECTIVES**

NEWS AND CURRENT ISSUES



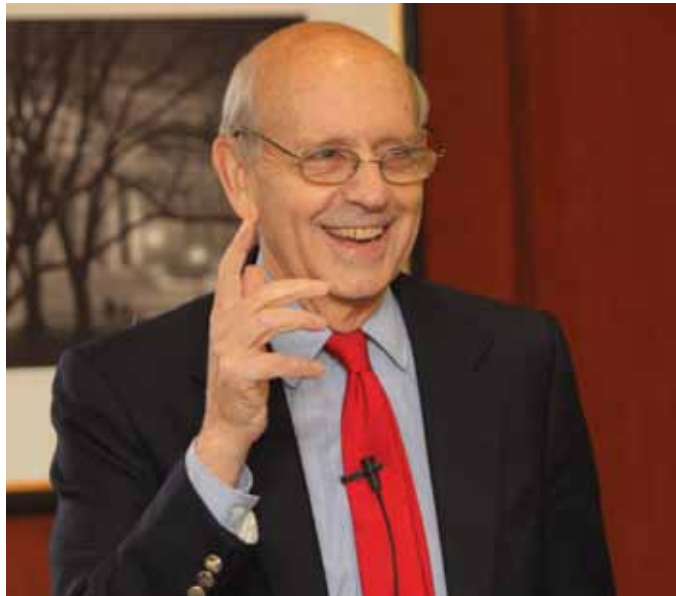
[NEWS AND EVENTS]

**COPYRIGHT SYMPOSIUM
HONORS JUSTICE BREYER'S
SCHOLARSHIP**

On November 4, 2010, GW Law was proud to host the Honorable Stephen G. Breyer of the U.S. Supreme Court for an all-day symposium dedicated to the 40th anniversary of then-Professor Breyer's article "The Uneasy Case for Copyright."

The symposium included four panels of law professors and economists from six universities in the United States and three in England, Germany, and Israel. The panelists presented papers on a variety of topics, including economic analysis, copyright's effect on particular industries, and historical and empirical perspectives. The papers will be published in a forthcoming issue of *The George Washington Law Review*.

In his keynote address at lunch, Justice Breyer discussed how changing technology does and will affect the development of copyright law. Justice Breyer suggested that, despite rapid change, many new questions can be answered by looking deeply into the purpose of the copyright law and considering the economic and empirical evidence about the effect of



SUPREME COURT ASSOCIATE JUSTICE STEPHEN G. BREYER

various regimes — the very approach that was suggested in the justice's 1970 law review article.

Justice Breyer's visit was especially meaningful for

the GW Law IP community because it was organized and run by Professor Robert Brauneis, co-director of the IP program and a former clerk for then-First Circuit Judge Breyer.

★ ★ ★

SPRING 2011

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[FACULTY]

FACULTY NEWS



MICHAEL ABRAMOWICZ

Professors **Michael Abramowicz** and **John Duffy** had articles accepted by the law reviews of Harvard, Yale, and Stanford. In particular, Harvard will publish Professor Abramowicz's article "Orphan Business Methods" on constructing new intellectual property protections specifically to fit the needs of business.

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Costco: POST-SUPREME COURT ARGUMENT DISCUSSION HELD AT GW LAW

On November 8, the U.S. Supreme Court heard oral argument in the copyright case of *Costco v. Omega*. The question presented was whether copyright law's "first sale" doctrine applies to items manufactured outside of the United States. That afternoon, the IP program, in conjunction with the DC Chapter of the Copyright Society of the USA, hosted a discussion of the argument that occurred that morning. Professor Robert Brauneis introduced the program and the issues, and

Christopher Mohr of Meyer, Klipper & Mohr moderated a panel that included representatives from four organizations that filed briefs in the case. Panelists included Scott Bain, representing the Software and Information Industry Association; Ronald Dove of Covington & Burling, representing the American Watch Association; Seth Greenstein of Constantine Cannon, representing the Retail Industry Leaders Association; and Sherwin Sly, representing Public Knowledge.

GW HOSTS RECEPTION AT AIPLA ANNUAL MEETING

The GW IP Program continued its tradition of hosting a reception for alumni and friends during the American Intellectual Property Law Association (AIPLA) Annual Meeting. This year, the reception was held at the Marriott Wardman Park and was attended by more than 100 people. Intellectual Property Advisory Board (IPAB) Associate Dean for Intellectual Property Studies John Whealan, Professor Robert Brauneis, Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit, and Visiting Professor Gregory Dolin greeted the attendees.

Several distinguished guests attended as well, including the Honorable Richard Linn, circuit judge of the U.S. Court of Appeals for the Federal Circuit; the Honorable David Kappos, director of the USPTO; and the Honorable Q. Todd Dickinson, former director of the USPTO and current executive director of AIPLA. GW Law plans to continue this tradition of holding IP receptions in conjunction with annual meetings of national IP organizations such as AIPLA, INTA, and BIO. Please visit the IP Events listing at www.law.gwu.edu/ipevents for details.

RECEPTION HONORS CHIEF JUDGE RADER'S ELEVATION ON FEDERAL CIRCUIT



PICTURED (LEFT TO RIGHT): PROFESSOR SEAN O'CONNOR, UNIVERSITY OF WASHINGTON SCHOOL OF LAW; CHIEF JUDGE RANDALL RADER; AND PROFESSOR ROBERT BRAUNEIS PERFORM FOR AN ENTHUSIASTIC CROWD OF STUDENTS, FACULTY, ALUMNI, AND FRIENDS.

The IP Program hosted a reception to honor Judge Randall R. Rader's appointment as the sixth chief judge of the U.S. Court of Appeals for the Federal Circuit. Chief Judge Rader is one of the most renowned members of the GW Law IP family. He is an alumnus

(JD '78), a professorial lecturer in law teaching two IP-related courses every year, and a member of our IP Advisory Board. As a small token of our appreciation, GW Law hosted a reception in Chief Judge Rader's honor on Wednesday, November 17, 2010.

At the reception, Chief Judge Rader performed live with four other musicians including Sean O'Connor (a professor at the University of Washington School of Law), Matt Bryan (former law clerk to Chief Judge Rader), and students Jon Knight and Matthew

Ling. The reception was attended by more than 150 of Chief Judge Rader's friends. Dean Whealan commented, "Given how much Chief Judge Rader has contributed and meant to GW, the Law School was pleased to honor him in this unique—and very fun—way."

JUDGE PLAGER DELIVERS FALL KATZ LECTURE

The Honorable S. Jay Plager of the U.S. Court of Appeals of the Federal Circuit gave the fall A. Sidney Katz Lecture on Wednesday, October 20, 2010, the night before the start of the AIPLA Annual Meeting in Washington, DC. Judge Plager lectured to a gathering of approximately 100 attendees on the evolution of the Federal Circuit from the early 1980s to the present day and discussed challenges facing the court and the patent community in the coming years.

The lecture by Judge Plager

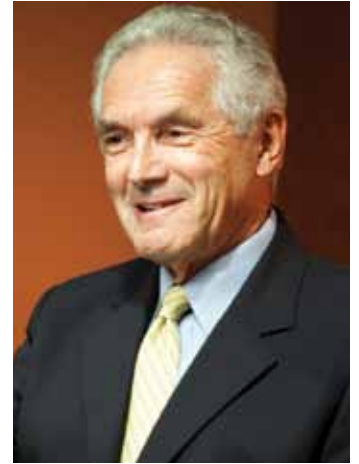
was especially significant because prior to taking his seat on the federal bench, he served as a professor of law and a dean of Indiana University School of Law. With this background, Judge Plager's comments were particularly valuable to GW Law's academic community.

The lecture was followed by a reception where students, faculty, and guests were able to talk to Judge Plager in an informal setting.

The next Katz Lecture will be held on April 14, 2011, and Donald Dunner will be the

featured speaker. Dunner, a name partner of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, has argued more patent cases before the Federal Circuit than any other current practitioner. (See page 5 for more information.)

The Katz Lecture is generously endowed by A. Sidney Katz (J.D. '66). The endowment allows the IP program to hold one IP lecture per semester. For information on future Katz lectures or other IP-related events, visit our website at www.law.gwu.edu/ipevents.



THE HON. S. JAY PLAGER

FALL SPEAKER SERIES DRAWS DIVERSE SPEAKERS

During the fall of 2010, the Dean Dinwoodey Center for Intellectual Property Studies presented four luncheon lectures by IP scholars from around the country. On September 9, Professor Timothy Holbrook from Emory University School of Law presented his paper "Patents, Presumptions, and Public Notice," in which he

discusses various aspects of patent claim construction. On September 23, Professor Abraham Drassinower from the University of Toronto presented his paper "What's Wrong with Copying?" On October 7, Professor Julie Cromer Young from Thomas Jefferson School of Law presented another copyright-related paper,

"Copyright in Memoriam," in which she examines how copyright laws relate to national monuments. And finally, on November 17, Professor Sean O'Connor from the University of Washington School of Law presented "Who Should Own Government-Funded Inventions? A Reconsideration of the pre-Bayh-Dole Kennedy Policy

for Technology Transfer."

These lunchtime presentations—which are attended by students, faculty, alumni, and members of the public—are generously made possible by a gift from the Bureau of National Affairs. Details on future lunches (including how to RSVP) can be found at www.law.gwu.edu/ipevents.



{UPCOMING EVENTS}

IP BOARD TO MEET IN SAN FRANCISCO



The IP Advisory Board (IPAB) will hold its spring meeting in San Francisco March 17–20, 2011. A half-day IP conference will be held at the Ritz Carlton San Francisco on Friday morning, March 18.

Confirmed conference speakers include:

- Judge Randall R. Rader (JD '78), chief judge, U.S. Court of Appeals for the Federal Circuit
- Bruce Sewell, general counsel, Apple
- Mark Chandler, general counsel, Cisco
- David Anderman, general counsel, Lucas Films
- Mike Jacobson, general counsel, eBay

In addition, the IPAB will attend an admitted student and alumni reception on Thursday, March 17. This event will give newly admitted students, alumni, and board members an opportunity to connect with Interim Dean Gregory E. Maggs, IPAB Associate Dean for Intellectual Property Studies John Whealan, and faculty members. Attendance at these events by alumni and friends is complimentary. Additional information can be found on the IP Events page, www.law.gwu.edu/ipevents, or by contacting Associate Dean John Whealan.

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G. FRANKLIN ROTHWELL ENDOWS GILES RICH MOOT COURT COMPETITION

Alumnus and close friend of GW Law G. Franklin Rothwell (JD '56) has generously endowed through the Rothwell Family Foundation the Giles Rich Moot Court Competition in the name of his firm, Rothwell, Figg, Ernst & Manbeck, P.C. The competition is held annually and is among the most popular moot court competitions at the Law School. "Frank Rothwell's generous gift to endow the competition is just another example of his philanthropy associated with GW Law. It will allow this competition to continue with a level of excellence it deserves," commented Dean Whealan.

During the 2010–11 academic year, the competition had 55 student participants. In the competition, students are presented with a problem drafted by the AIPLA and then write briefs for both the appellant and appellee. After briefs are submitted, students engage in an oral argument before panels of practicing attorneys, law

professors, current Federal Circuit law clerks, and past competition winners. The top two teams met in the final round in January before a three-member panel. This year's panel included Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit, Judge Kent Jordan of the U.S. Court of Appeals for the Third Circuit, and Associate Dean John Whealan.

This year's winning team consisted of Brian Prince and Nicholas Kunz; the runner-up team consisted of Alexander Varond and Thomas Yeh. "It was an extremely close competition," commented Chief Judge Rader as he praised both teams after the event. Both teams will move on to compete in the regional competition and will be coached by Dean Whealan.

Additional awards from the earlier rounds included Best Brief: Alexander Varond and Thomas Yeh; Best Oralist: Scott Hughes; and Best Overall Competitor: Alexander Varond.



PICTURED (LEFT TO RIGHT): NICHOLAS KUNZ, JUDGE KENT A. JORDAN, CHIEF JUDGE RANDALL R. RADER, IPAB DEAN JOHN WHEALAN, AND BRIAN PRINCE.

GW LAW HOLDS CONFERENCE ON PATENTABLE SUBJECT MATTER

One of the first events of the fall 2010 semester was a conference on patentable subject matter in light of the recently issued U.S. Supreme Court decision in *Bilski v. Kappos* and of the ongoing *ACLU v. Myriad* case challenging gene patents. The Honorable Paul Michel, former chief judge of the U.S. Court of Appeals for the Federal Circuit and author of the Federal Circuit's *Bilski* majority opinion, delivered the keynote address.

Following Judge Michel's speech, two panels discussed the likely evolution of patentable subject matter jurisprudence. The first panel was composed of Robert W. Bahr, senior patent attorney, Office of the Deputy Commissioner for Patent Examination Policy, USPTO; John Duffy, Oswald Symister Colclough Research Professor of Law; David Olson, assistant professor, Boston College Law School; Richard Wilder, associate

general counsel for intellectual property policy, Microsoft; and Michael B. Abramowicz, professor of law. The panel discussed the future of patents on software and business methods.

A second panel composed of F. Scott Kieff, professor of law; Dan Ravicher, lecturer of law, Benjamin N. Cardozo School of Law, and executive director, Public Patent Foundation; Hans Sauer, associate general counsel, Biotechnology Industry Organization; and John M. Whealan, IPAB associate dean for intellectual property law studies, discussed patentability issues focused on life sciences and gene patents. Chief Judge Michel's speech and each of the panel's discussions included a question and answer session with the audience.

The conference was attended by more than 70 people, including students, academics, government officials, and practitioners. ★

[ALUMNI & FRIENDS]

GW Loses Member of its IP Family, Bertram Rowland

The GW Law IP community was saddened by the passing of Bertram Rowland (1930–2010), who graduated from GW Law in 1961. Rowland is best known as the patent attorney who, during the 1970s, drafted and prosecuted before the USPTO the famous Cohen-Boyer recombinant DNA-cloning patents. These patents protected the work of Stanley Cohen (Stanford University) and Herbert Boyer (UC-San Francisco), who invented a method of cloning genetically engineered molecules in foreign cells. These patents have been recognized as making a significant contribution to the birth of the biotechnology

industry in existence today.

While a student at GW Law, Rowland began his patent career as a patent agent for DuPont and later became a patent attorney for Chevron Research Corp. He was named partner at Townsend & Townsend and later at Flehr, Hohbach, Test, Albritton & Herbert. He also served as general counsel for several biotech companies and helped found such companies as well. Rowland wrote and prosecuted more than 500 issued patents during his illustrious career.

In his spare time, he was an avid hiker and chess player and a friend to many.

SPRING IP SERIES ANNOUNCED

GW Law's Dean Dinwoodey Center for Intellectual Property Studies presents four outstanding luncheon lectures featuring IP scholars from around the country who will present and discuss their current research. Lunch will be included.

THURSDAY, JANUARY 20

Irina D. Manta, Case Western Reserve University School of Law
"The Puzzle of Criminal Sanctions for Intellectual Property Infringement"

THURSDAY, FEBRUARY 3

Eric R. Claeys, George Mason University School of Law
"Intellectual Property and John Locke's Theory of Labor"

WEDNESDAY, MARCH 9

Joshua Walker, Stanford Law School
"The Four Questions: Empirical Performance Measure for the Patent System"

WEDNESDAY, MARCH 30

Gideon Parchomovsky, University of Pennsylvania Law School
Title to be announced

All lectures will be held at 1:30 pm in Tasher Great Room, Burns Library, First Floor.

All are welcome to these lunch presentations, which are generously made possible by a gift from the Bureau of National Affairs (BNA). Details about both past events and future lunches (including how to RSVP) can be found at www.law.gwu.edu/ipevents.

[UPCOMING EVENTS]

SPRING KATZ LECTURE TO FEATURE DON DUNNER



DONALD DUNNER

On April 14, 2011, the IP program will present its semi-annual A. Sidney Katz Lecture. Donald Dunner, a named partner in the law firm of Finnegan, Henderson, Farabow, Garrett & Dunner who has argued more appeals in the Federal Circuit than any other currently practicing attorney, will deliver the lecture. As always, the lecture will be open to the faculty, students, alumni, and friends of GW Law. A reception will follow. For more information, visit www.law.gwu.edu/ipevents.

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[UPCOMING EVENTS]

MUNICH SUMMER 2011 TO BUILD ON PAST SUCCESSES



GW Law offers a unique experience by allowing students to study IP in Munich, Germany, at the Max Planck Institute for Intellectual Property. The program consists of eight one-credit courses taught over a four-week period by IP professors from GW Law as well as from around the United States and the world. The program is open to GW Law students as well as law students throughout the United States. Class sizes are typically small in size (akin to a seminar), and students may take courses and professors they may not ordinarily be able to take at the Law School during the normal academic year.

The tentative curriculum for the the summer 2011 program is as follows:

1ST SESSION, JUNE 27–JULY 8:

- **Cross-Border Trade in IP**, Professor Dan Burk, University of California, Irvine School of Law
- **Philosophical Foundations of IP**, Professor Michael Madison, University of Pittsburgh School of Law
- **Copyright and the Changing Role of the Copy**, Professor Robert Brauneis, The George Washington University Law School
- **Trademarks and Geographical Locations**, Professor Signe Naeve, University of Washington School of Law

2ND SESSION, JULY 11–JULY 22:

- **Internet Law**, Professor Robert Heverly, Albany Law School
- **International Patent Law**, Professor Margo Bagley, University of Virginia School of Law
- **IP and Indigenous Heritage**, Professor Silke von Lewinski, Max Planck Institute
- **TRIPS, Patents, and Public Health**, instructor TBD ★

[ALUMNI & FRIENDS]

IP Alumni News

- Garth Baer (JD '07) recently finished his clerkship with the Federal Circuit and joined the patent firm of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP.
- Alec Rosenberg (JD '01) made partner at Arent Fox. ★

[CURRICULUM]

NEW IP COURSE ON ITC SECTION 337 ENFORCEMENT

In February, the GW Law faculty approved a new course, “Enforcement of Intellectual Property Rights in the United States International Trade Commission.” This course will provide an in-depth examination of 19 USC § 1337 (commonly referred to as “Section 337”) and IP enforcement before the U.S. International Trade Commission (ITC). Enforcement of IP rights before the ITC under Section 337 has significantly increased during the last decade and is now often chosen over patent litigation in district court. As a result, many law firms (and in particular IP firms with Washington, DC, offices) have added or expanded existing ITC practice groups. Many GW Law students are hired by these firms and asked to work on ITC litigation. Recently, several law students have done internships at various offices at the ITC (including interning for ITC administrative law judges).

The co-directors of the IP program believe this course will be a fitting addition to the current IP program. The directors have had requests from both IP students and members of the IP bar to consider adding a class such as this. In addition, many of our international IP LL.M. students will likely take this class since all ITC IP cases involve allegedly infringing goods that are imported into the United States from other countries.

The course will be co-taught by Judge Theodore Essex and Michael McKeon (JD '96). Judge Essex is an administrative law judge at the ITC with extensive knowledge of Section 337 and IP enforcement actions brought before the agency. Mr. McKeon is a partner at the Washington, DC, law firm of Fish & Richardson and is one of the leading practitioners before the ITC involving Section 337. ★

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JOHN DUFFY

Stanford has agreed to publish Professor Duffy's article "Why Business Method Patents?," explaining the reasons for the emergence of business method patents in the late 20th century. Yale will publish a joint work by Professors Abramowicz and Duffy, "The Inducement Standard of Patentability," on the nonobviousness doctrine and the standard articulated by the U.S. Supreme Court that patents should be awarded to "those inventions which would not be disclosed or devised but for the inducement of a patent."



ROBERT BRAUNEIS

Professor **Robert Brauneis** has published an article he co-authored with Professor Paul Heald of the University of Georgia, "Trademark

Infringement, Trademark Dilution, and the Decline in Sharing of Famous Brand Names: An Introduction and Empirical Study," in the *Buffalo Law Review*.



ORIN KERR

In October 2010, Professor **Orin Kerr** appeared as a guest on the National Public Radio program *On Point* discussing the case of the Rutgers University suicide and online privacy. You can listen to the show at: <http://www.onpointradio.org/2010/10/rutgers-suicide-online-privacy>.

Professor **F. Scott Kieff** recently published an essay "The Patent Process Run Amok" in *Defining Ideas, a Hoover Institution Journal*, in which he discusses the pending U.S. Supreme Court



F. SCOTT KIEFF

case, *Microsoft v. i4i* (Professor Kieff is a senior fellow at Stanford University's Hoover Institution). In December 2010, Professor Kieff published an opinion piece in the *National Law Journal*, "The Importance of Finality in Patent Litigation," in which he discusses the pending Federal Circuit *en banc* case *TiVo v. Echostar*.



SARAH RAJEC

We are excited to have Professor **Sarah Rajec** return as a Frank H. Marks Visiting Associate Professor and Administrative Fellow in IP Law. Professor Rajec previously served as a Marks Fellow in 2008-2009. Since 2009, she has been a law clerk to Judge Alan Lourie, U.S. Court of Appeals for the Federal Circuit. She will return to GW Law to complete the second year of her fellowship in August 2011 (she served the clerkship in between her two-year term). The Marks IP Fellowship has three elements: research, teaching, and administration of the IP program. The fellow teaches one course per academic year and assists with administration of the Dean Dinwoodey Center for Intellectual Property Studies. The Marks IP Fellow has the opportunity to pursue a scholarly project and prepare to enter the law teaching market, normally in the fall semester of the second year.



JOHN WHEALAN

IPAB Associate Dean for Intellectual Property Studies **John Whealan** was recently appointed to the Federal Circuit Advisory Council. Dean Whealan will serve on the Advisory Council with other academics, government officials, and Federal Circuit practitioners. The Advisory Council assists the chief judge and the Federal Circuit with various court-related matters as assigned. Dean Whealan is a former clerk to Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit. ★



IP PERSPECTIVES

IP Perspectives is published by the Intellectual Property Law Program at The George Washington University Law School.

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