The Boundaries of Intellectual Property Symposium (Program)

Institute of Bill of Rights Law at the William & Mary Law School

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WILLIAM & MARY SCHOOL OF LAW

THE BOUNDARIES OF INTELLECTUAL PROPERTY

Symposium

FEBRUARY 6-7, 2009
Sponsored by the Institute of Bill of Rights Law
Schedule*
Friday, February 6, 2009

9:00-9:40 a.m. Breakfast (outside Room 127)

9:40 a.m.
Welcoming Remarks
Lynda L. Butler, Interim Dean and Chancellor Professor of Law
Paul Marcus, Haynes Professor of Law and Kelly Professor of Teaching Excellence

9:45-10:15 a.m.
Introduction: What We Talk About When We Talk About Boundaries
Wendy J. Gordon, Boston University School of Law
Jessica Litman, University of Michigan Law School

10:15 a.m.-12:15 p.m.
The Boundaries of Copyright and Trademark/Consumer Protection Law
Dan L. Burk, UC Irvine School of Law, Trademark and the Boundaries of the Firm
(with Brett McDonnell, University of Minnesota Law School)
Jason Mazzone, Brooklyn Law School, Who Should Regulate Fair Use?
Rebecca Tushnet, Georgetown University Law Center,
Economies of Desire: Fair Use and Marketplace Assumptions
Jane Winn, University of Washington Law School, Better Regulation for Consumers: Integrating ICT Standards and Consumer Protection
(with Nicolas Jondet, University of Edinburgh)

Commentators:
James Gibson, University of Richmond School of Law
Steven Hetcher, Vanderbilt University Law School

12:30-2:30 p.m. Lunch (on your own)

2:30-4:30 p.m.
The Boundaries of Patent Law
Margo A. Bagley, University of Virginia School of Law,
Like Shifting Sand: Subject Matter Boundaries in Patent Law
John F. Duffy, The George Washington University Law School,
Rules and Standards on the Forefront of Patentability
Mark A. Lemley, Stanford Law School,
Distinguishing Lost Profits from Reasonable Royalties
Michael J. Meurer, Boston University School of Law
Patent Examination Priorities

Commentator:
Joshua D. Sarnoff, American University-Washington College of Law

End of the First Day

*All panels will take place in Room 127
Schedule
Saturday, February 7, 2009

9:00-9:30 a.m. Breakfast (outside Room 127)

9:30-11:30 a.m.
Crossing Boundaries
Graeme B. Dinwoodie, Chicago-Kent College of Law, Developing a Private International Intellectual Property Law: The Death of Territoriality?
Brett Frischmann, Loyola University Chicago School of Law, Spillovers Theory and Its Conceptual Boundaries
Mark P. McKenna, University of Notre Dame Law School, An Alternate Approach to Channeling?
Pamela Samuelson, Berkeley Law School, Evolving Conceptions of Patent and Copyright Subject Matter

11:30-11:45 a.m. Break

11:45 a.m.-12:30 p.m.
Conclusion: Where Do We Go From Here?
Wendy J. Gordon, Boston University School of Law
Jessica Litman, University of Michigan Law School
End of the Symposium

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BIOGRAPHICAL SKETCHES OF PRESENTERS AND COMMENTATORS

MARGO A. BAGLEY is Professor of Law and Class of 1941 Research Professor at the University of Virginia School of Law where she teaches a variety of intellectual property courses including patent law and international patent law and policy. Her scholarship engages many aspects of patent law, including technology transfer, the role of morality in biotechnology patenting, traditional knowledge protection, and access to essential medicines. Professor Bagley is a member of the Georgia bar and is licensed to practice before the U.S. Patent & Trademark Office. She enjoyed an intellectual property practice with the law firms Smith, Gambrell & Russell, LLP and Finnegan, Henderson, Farabow, Garrett & Dunner, LLP before becoming an assistant professor of law at Emory University School of Law in 1999. She was a visiting professor of law at Washington & Lee University School of Law in Fall 2001 and has also taught international patent law and policy courses in Germany, China and Singapore. Prior to pursuing a career in law, Professor Bagley worked in products research and development at the Procter & Gamble Company and as a senior research analyst for the Coca-Cola Company. Professor Bagley holds a B.S. in Chemical Engineering from the University of Wisconsin and a J.D. from Emory University School of Law.

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DAN L. BURK is Chancellor’s Professor of Law at the University of California, Irvine, where he is a founding member of the law faculty. An internationally prominent authority on issues related to high technology, he lectures, teaches, and writes in the areas of patent, copyright, electronic commerce, and biotechnology law. He is the author of numerous papers on the legal and societal impact of new technologies, including articles on scientific misconduct, on the regulation of biotechnology, and on the intellectual property implications of global computer networks.

Professor Burk holds a B.S. in Microbiology (1985) from Brigham Young University, an M.S. in Molecular Biology and Biochemistry (1987) from Northwestern University, a J.D. (1990) from Arizona State University, and a J.S.M. (1994) from Stanford University. He has served as a legal advisor to a variety of private, governmental, and intergovernmental organizations, including the American Civil Liberties Union Committee on Patent Policy, the OECD Committee on Consumer Protection, and the United States State Department Working Group on Intellectual Property, Interoperability, and Standards.

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GRAEME B. DINWOODE is Professor of Law, Associate Dean, and Director of the Program in Intellectual Property Law at Chicago-Kent College of Law. He is the author of several casebooks and numerous articles on various aspects of intellectual property law. Professor Dinwoodie has served as a consultant to the World Intellectual Property Organization, as an Adviser to the American Law Institute Project on Principles on Jurisdiction and Recognition of Judgments in Intellectual Property Matters, and as a Consultant to the United Nations Conference on Trade and Development.

Professor Dinwoodie holds a First Class Honors LL.B. degree from the University of Glasgow, an L.L.M. from Harvard Law School, and a J.S.D. from Columbia Law School.

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JOHN F. DUFFY is the Oswald Symister Coichlough Research Professor of Law at the George Washington University Law School. Professor Duffy received an A.B. in physics from Harvard College in 1985 and a J.D. from the University of Chicago in 1989. Prior to entering academia, Professor Duffy clerked for Judge Stephen Williams on the United States Court of Appeals for the
D.C. Circuit and for Justice Scalia on the United States Supreme Court and also served as an
Attorney-Advisor in the Department of Justice's Office of Legal Counsel.

Professor Duffy has co-authored a casebook on patent law, Patent Law and Policy (4th ed. 2007)
(with Robert Patrick Merges), has published numerous law review articles on a wide range of issues
concerning regulatory law and intellectual property, and was recently awarded a major grant by the
Kauffman Foundation to study intellectual property and entrepreneurship. In May of 2008, he was
invited to present oral argument as an amicus curiae in an en banc Federal Circuit case concerning
the scope of patentable subject matter (In re Bilski).

BRETT FRISCHMANN is an Associate Professor of Law at the Loyola University Chicago School of Law.
He is currently visiting Cornell Law School during 2007-2008 and recently visited Fordham
University Law School (2007) and Syracuse University College of Law (2006). Professor
Frischmann graduated Order of the Coif from the Georgetown University Law Center. After law
school, he was an associate with Wilmer, Cutler & Pickering in Washington, DC, where his practice
focused on communications, e-commerce and intellectual property law. Prior to joining the Loyola
faculty, Professor Frischmann clerked for the Honorable Fred I. Parker of the U.S. Court of Appeals
for the Second Circuit. Professor Frischmann has published articles on a wide variety of topics,
ranging from the law and economics of science and technology policy to the role of compliance
institutions in international law. His recent work examines the relationships between
infrastructural resources, property rights, commons, and spillovers.

JAMES GIBSON is Associate Professor of Law and Director of the Intellectual Property Institute at the
University of Richmond School of Law, where he teaches intellectual property, computer law, and
related courses. His research focuses on the creation and regulation of intellectual property rights,
and he frequently writes, speaks, and consults on the relationship between new technologies and
intellectual property law. His articles have appeared in the Yale Law Journal, the Notre Dame Law
Review, and elsewhere. He has authored amicus briefs in Supreme Court cases and has been quoted
publications.

WENDY GORDON is the Paul S. Beck Professor of Law at Boston University. This term she is serving as
the Bacon-Kilkenny Distinguished Visiting Professor at Fordham University Law School. She most
explicitly addressed the issue of boundaries in her article "An Inquiry into the Merits of Copyright,"
where she looked at functional purposes that boundaries serve. She also addressed economic
market failure as a boundary in "Fair Use as Market Failure," and in "A Property Right in Self-
Expression" argued that John Locke’s labor theory puts boundaries around copyright claims.

STEVEN HETZER is Professor of Law at Vanderbilt University Law School. His research focuses on
the role of social norms in the law and challenges the economic account of custom and tort law and
the norms-based theories of first-generation law and economics. His scholarship also concentrates
on the Internet, intellectual property and privacy. He joined the Vanderbilt law faculty in 1998 after
practicing at Arnold & Porter. He is the author of Norms in a Wired World (Cambridge University
Press, 2004) as well as several articles.
MARK A. LEMLEY is the William H. Neukom Professor of Law at Stanford Law School, the Director of the Stanford Program in Law, Science and Technology, and the Director of Stanford's LLM Program in Law, Science and Technology. He teaches intellectual property, computer and Internet law, patent law, and antitrust. He is of counsel to the law firm of Keker & Van Nest, where he litigates in the areas of antitrust, intellectual property and computer law. He is the author of six books (all but one in multiple editions) and 100 articles on these and related subjects, including the two-volume treatise IP and Antitrust. His works have been reprinted throughout the world, and translated into Chinese, Japanese, Spanish, and Italian. He has taught intellectual property law to federal and state judges at numerous Federal Judicial Center and ABA programs, has testified six times before Congress and numerous times before the California legislature, the Federal Trade Commission and the Antitrust Modernization Commission on patent, trade secret, antitrust and constitutional law matters, and has filed numerous amicus briefs before the U.S. Supreme Court, the California Supreme Court, and the federal circuit courts of appeals. He has been named California Lawyer's Attorney of the Year (2005), a Young Global Leader by the Davos World Economic Forum (2007), one of the top 50 litigators in the country under 45 by the American Lawyer (2007), one of the 100 most influential lawyers in the nation by the National Law Journal (2006), one of the top 25 intellectual property lawyers in California (2003) and one of the 100 most influential lawyers in California by the Daily Journal (2004, 2005 and 2006), and one of the 500 leading lawyers in the country by Lawdragon Magazine, among other honors. In 2002 he was chosen Boalt's Young Alumnus of the Year.

Professor Lemley received his J.D. from Boalt Hall School of Law at the University of California at Berkeley, and his A.B. from Stanford University. After graduating from law school, he clerked for Judge Dorothy Nelson on the United States Court of Appeals for the Ninth Circuit, and has practiced law in Silicon Valley with Brown & Bain and with Fish & Richardson. Until January 2000, he was the Marrs McLean Professor of Law at the University of Texas School of Law, and until June 2004 he was the Elizabeth Josslyn Boalt Professor of Law at the Boalt Hall School of Law, University of California at Berkeley.

JESSICA LITMAN rejoined the Michigan Law faculty in 2006. She was previously Professor of Law at Wayne State University in Detroit, where she taught copyright law, Internet law, and trademarks and unfair competition. She was also a faculty member at the University of Michigan Law School from 1984-1998 and a visiting professor at NYU Law School and at American University Washington College of Law. Professor Litman is the author of the book Digital Copyright, and the coauthor with Jane Ginsburg and Mary Lou Kevlin of the casebook Trademarks and Unfair Competition Law. She has testified before Congress and the White House Information Infrastructure Task Force’s Working Group on Intellectual Property, and is a trustee of the Copyright Society of the USA and the 2007 chair of the American Association of Law Schools Section on Intellectual Property. Professor Litman serves on the Advisory Board for the Public Knowledge organization and has served on the National Research Council’s Committee on Partnerships in Weather and Climate Services. She is a member of the Intellectual Property and Internet Committee of the ACLU and the advisory board of Cyberspace Law Abstracts. Professor Litman has a B.A. from Reed College, an M.F.A. from Southern Methodist University, and a J.D. from Columbia Law School. After law school, she clerked for Judge Betty Fletcher on the United States Court of Appeals for the Ninth Circuit.

JASON MAZZONE joined the faculty of Brooklyn Law School in 2003. He teaches Constitutional Law, American Legal History, and advanced courses in intellectual property law. In the field of
Mazzone works principally on the problem of overreaching: assertions of IP rights beyond those the law actually confers. His article on this problem, "Copyfraud," was recently published in the NYU Law Review. His book, *Copyfraud and Other Abuses of Intellectual Property* is forthcoming from Stanford University Press. Mazzone received his LL.M. and J.S.D. from Yale Law School, his J.D. from Harvard Law School, his M.A. from Stanford University, and his B.A. from Harvard University. He was a law clerk to Judge Robert D. Sack of the United States Court of Appeals for the Second Circuit and to Judge John G. Koeltl of the United States District Court for the Southern District of New York.

MARK P. MCKENNA is an Associate Professor of Law at the Notre Dame Law School. A graduate of the University of Notre Dame and the University of Virginia School of Law, Professor McKenna has written primarily in the areas of trademark law and the right of publicity. His 2007 article *The Normative Foundations of Trademark Law* received the Ladas Memorial Award for writing excellence on the subject of trademarks. Before beginning his teaching career at Saint Louis University School of Law, where he taught until joining the Notre Dame faculty in 2008, Professor McKenna practiced law with an intellectual property firm in Chicago, litigating trademark and copyright cases and advising clients on a variety of intellectual property issues.

MICHAEL MEUER is a Michaels Faculty Research Scholar and Professor of Law at Boston University School of Law. He received his S.B. from the Massachusetts Institute of Technology, a J.D. from the University of Minnesota, and a Ph.D. in Economics from the University of Minnesota. Professor Meurer became an economics professor at Duke University and later a law professor at the University of Buffalo. He came to Boston University School of Law in 1999, where he has taught courses in patents, intellectual property and public policy toward the high-tech industry.

Professor Meurer has received several grants and fellowships, including two grants from the Pew Charitable Trust, a Ford Foundation grant, an Olin Faculty Fellowship at Yale Law School and a postdoctoral fellowship at AT&T Bell Labs. He has served as an expert witness for the Federal Trade Commission in a merger case presenting issues related to patent licensing. He has consulted with government officials from developing countries about antitrust law, and taught short courses in American intellectual property law at the law faculties of the University of Victoria and the National University of Singapore.

PAMELA SAMUELSON is the Richard M. Sherman '74 Distinguished Professor of Law and Information at the University of California at Berkeley and a Director of the Berkeley Center for Law & Technology. She teaches courses on intellectual property, cyberlaw, and information privacy. She has written and spoken extensively about the challenges that new information technologies pose for traditional legal regimes, especially for intellectual property law.

JOSHUA D. SARNOFF is the Assistant Director of the Glushko-Samuelson Intellectual Property Law Clinic and a practitioner-in-residence at the Washington College of Law, American University, where he supervises law students in the practice of intellectual property law. He is a registered patent attorney, teaches patent law, and has been involved in a wide range of intellectual property legal and policy disputes. He has published articles on patent law, has coordinated an academic position statement on patent law reform, has filed amicus briefs in the United States Supreme Court and the Court of Appeals for the Federal Circuit, and has been a consultant to the United Nations.
Conference on Trade and Development on intellectual property, trade, and environmental issues, and a pro-bono mediator for the Federal Circuit in patent cases. Mr. Sarnoff was formerly in private practice in Washington, D.C., and previously taught at the University of Arizona College of Law.

Professor Sarnoff was awarded the Emnalee C. Godsey Scholarship Award in 2005 for the following publications: The Historic and Modern Doctrine of Equivalents and Claiming the Future, Part I (1790-1870) and The Historic and Modern Doctrine of Equivalents and Claiming the Future, Part II (1870-1952).

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REBECCA TUSHNET is a professor of law at the Georgetown University Law Center. She clerked for Associate Justice David H. Souter and worked on intellectual property litigation before beginning teaching. Her work currently focuses on trademark law and on the relationship between the First Amendment and false advertising law. She has advised and represented several fan fiction websites in disputes with copyright and trademark owners. She is a member of the board of the Organization for Transformative Works, a nonprofit dedicated to supporting and promoting fanworks. She is also an expert on the law of engagement rings.

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JANE K. WINN is the Charles I. Stone Professor and director of the Shidler Center for Law, Commerce & Technology at University of Washington, and has published widely in the areas of commercial law, comparative law and technology law. She is a Senior Fellow of the University of Melbourne School of Law and a Fulbright Scholar. Her current research interests include developments in technology law and governance in the United States, the European Union, and China. She is coauthor of the treatise Law of Electronic Commerce and the casebook Electronic Commerce.