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**TEN CHALLENGES IN TECHNOLOGY AND
INTELLECTUAL PROPERTY LAW FOR 2015: REMARKS AT
THE WAKE FOREST JOURNAL OF BUSINESS AND
INTELLECTUAL PROPERTY LAW SYMPOSIUM**

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I. INTRODUCTION

It is good to be back at Wake Forest Law, having taught Internet Law here a few years ago. It is also wonderful to see many current and former Elon students who are practicing around Winston-Salem, so I am excited to be here today to talk about these topics.

My goal for this twenty-minute talk is to highlight ten of the most important, or among the most important, issues that you might think about and look for in intellectual property (“IP”) and technology law and policy over the next year. Please keep in mind, of course, that we are struggling with the law in this area; that is the thread through which you can think about all of these topics. We are still struggling with what technology does to these older rules involving property ownership as well as access to, and the movement of information.

By way of a quick note, I am obviously speaking as of today. The reason that I offer this odd caveat is because over the last twenty-four hours I had to change my slides, given legislation that was introduced literally yesterday involving patent trolls.¹ Also, by way of disclosure as you are going to hear from Representative Holding later today, I have been an active opponent of federal trade secret reform efforts.² I was also a member of the North Carolina Mining & Energy Commission’s (“MEC”) Trade Secret Study Group, where I advised the MEC regarding the drafting of regulations involving hydraulic fracturing and the role of trade secret law.³ I am making these disclosures to underscore that I am not here to convince you of any particular position, but I merely want you to know where I stand. I am a fan of that kind of transparency.

¹ See Margaret Abernathy, *The Innovation Act of 2015: Congress Targets Patent ‘Trolls’ Again*, IP INTELLIGENCE (Mar. 26, 2015), <http://www.ipintelligencereport.com/2015/03/26/the-innovation-act-of-2015-congress-targets-patent-trolls-again/>.

² David S. Levine, *A Bibliography About Federal Trade Secret Law Reform (Guest Blog Post)*, TECH. & MKTG. LAW BLOG (Apr. 2, 2015), <http://blog.ericgoldman.org/archives/2015/04/a-bibliography-about-federal-trade-secret-law-reform-guest-blog-post.html>.

³ *Mining and Energy Commission*, N.C. DEP’T OF ENV’T AND NATURAL RES., <http://portal.ncdenr.org/web/mining-and-energy-commission/study-group-assignments> (last visited May 31, 2015).

II. TEN CHALLENGES IN TECHNOLOGY AND INTELLECTUAL PROPERTY LAW FOR 2015

A. Copyright Restatement

Starting this year, the American Law Institute (“ALI”) is going to be focusing on drafting a copyright restatement and there are some interesting issues that you may want to flag.⁴

Chris Sprigman, a professor at NYU Law, is going to be the ALI’s main reporter along with several other professors.⁵ One of the issues that they may focus on is copyright formalities, which is becoming an enormous issue from an orphan works perspective, that is, works of authorship for which it is difficult or impossible to find the author.⁶ Professor Sprigman has been an active scholar in that area in particular, so I would expect and you should look for that to be an issue.⁷

Additionally, the standard for copyright infringement and the rules regarding circumvention of copyright protection systems should also be a focus of the ALI. Think about the challenges involving the trans-border movement of copyrighted materials⁸ in particular. In addition, remedies have continued to pose a serious question with regard to copyright law for quite some time, especially as we figure out the link between copyright infringement and actual harms. For example, those who are infringing or pirating copyrighted works may not be people who would have otherwise purchased those particular works under whatever pricing scheme exists. Should their piracy be counted as a harm that must be remedied?

B. Digital Millennium Copyright Act (“DMCA”)

Along those lines, under copyright law, the DMCA⁹ will surely pose

⁴ *Current Projects*, THE AM. LAW INST., https://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=31 (last visited June 1, 2015).

⁵ *Id.*

⁶ Dinusha Mendis, *Orphan Works*, COPYRIGHTUSER.ORG, <http://copyrightuser.org/topics/orphan-works/> (last visited June 1, 2015).

⁷ Lawrence Solum, *Sprigman on Reformalizing Copyright*, LEGAL THEORY BLOG (Sept. 3, 2004, 8:49 AM), http://lsolum.typepad.com/legaltheory/2004/09/sprigman_on_ref.html.

⁸ See *International Copyright*, COPYRIGHT.GOV, www.copyright.gov/fls/fl100.html (last visited May 31, 2015).

⁹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860. In relevant part, it generally provides that one (a) cannot circumvent technological protection measures (“TPM”) and (b) cannot disseminate devices that circumvent, but it (c) protects “copyright management information.”

a challenge in 2015. Every three years, the Copyright Office has a rulemaking procedure where it reviews applications for exemptions.¹⁰ The rulemaking involves technological protection measures (“TPM”), which are measures used by content owners to prevent unauthorized access to copyrighted works.¹¹ An interesting exemption request comes from security researchers.¹² These are experts who look to see where vulnerabilities exist in cyber-security and elsewhere to attempt to understand and/or solve those problems, although the work can be controversial.

A group of security researchers, including Princeton Center for Information Technology Policy’s Professor Ed Felten, working with Visiting Professor Andrea Matwyshyn, have asked the Copyright Office to grant them an exemption for security research.¹³ They are basically asking the Copyright Office to grant an exemption that would say that they would not run afoul of copyright law if, through their research, they have to violate copyright law in order to assess cybersecurity concerns.¹⁴

It should be interesting to see what the Copyright Office does with this request, especially as cybersecurity presents a hot policy issue.

C. Net Neutrality

Federal Communication Commission (“FCC”) Chairman, Thomas Wheeler, just announced that the FCC is going to attempt to do what Tim Wu has named “net neutrality”¹⁵ through a variety of jurisdictional measures.¹⁶ Suffice to say that the connection to IP here, of course,

¹⁰ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55,687 (proposed Sept. 17, 2014) (to be codified at 37 C.F.R. 201.40), *available at*

<https://www.federalregister.gov/articles/2014/09/17/2014-22082/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control>.

¹¹ *Id.* at 55,692.

¹² Comments of Prof. Steven M. Bellovin (Columbia University), Prof. Matt Blaze (University of Pennsylvania), Prof. Edward W. Felten (Princeton University), Prof. J. Alex Halderman (University of Michigan), and Prof. Nadia Heninger (University of Pennsylvania) (the “Security Researchers”) on the Copyright Office’s Proposed Exemption under 17 U.S.C. 1201 (Feb. 6, 2015), *available at* http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_SecurityResearchers_Class25.pdf (last visited May 31, 2015).

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ See Tim Wu, *Network Neutrality FAQ*, TIMWU.ORG, http://www.timwu.org/network_neutrality.html (last visited May 31, 2015).

¹⁶ See Tim Wu, *Net-neutrality Rules are Far Too Important to Wait for Congress: FCC Boss Must Act Now*, N.Y. DAILY NEWS, Jan. 17, 2015, <http://www.nydailynews.com/opinion/tim-wu-net-neutrality-article-1.2081796>.

would be the question of how internet access providers like Verizon and the like will react to the new net neutrality rules. Now, those of you who have followed these issues in the last few years know that these issues have gone into court several times.¹⁷ It is not much of a bold prediction to say that this is likely to go back into court, but pay attention to it from an IP perspective because the overlap between net neutrality and copyright issues involving infringement should be an interesting topic to follow.

D. Keyword Advertising and Lawyers

Turning away from copyright law, I think the biggest challenge for me was to think about what would be a hot issue in trademark law from a technology perspective. Fortunately, there is an issue that should be of interest to North Carolina lawyers. It involves competitive keyword advertising, that is, the purchase of names by a competitor to allow for search queries to return advertisements for a competitor.¹⁸ For example, say that you search for Attorney Smith, and the query returns Attorney Jones. Attorney Jones may have purchased the name Attorney Smith from Google for search-based advertisements.

Interestingly, from a trademark perspective, the likelihood of consumer confusion here seems low. In other words, people looking for Attorney Smith would be unlikely to say, “Oh, I can’t tell the difference between Attorneys Smith and Jones.” But, from an ethics perspective, it is actually an interesting problem because North Carolina, in a 2012 formal ethics opinion, held that “the intentional purchase of the recognition associated with one lawyer’s name to direct consumers to a competing lawyer’s website is neither fair nor straightforward.”¹⁹ The state found that the purchase of an attorney’s name by a different attorney is a violation of its code of ethics.²⁰ North Carolina, as far as I can tell, is unique in taking this position. So one thing to keep in mind and to look for is the question of whether North Carolina is going to stay that way.

¹⁷ See, e.g., *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (illustrating the frequency with which net neutrality is being litigated); *Comcast Corp. v. FCC*, 600 F.3d 642, 657 (D.C. Cir. 2010) (also illustrating this frequency).

¹⁸ Eric Goldman and Angel Reyes III, *Regulation of Lawyers’ Use of Competitive Keyword Advertising*, U. ILL. L. REV. at 5 (forthcoming 2016), available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1882&context=fac_pubs.

¹⁹ *2010 Formal Ethics Opinion 14*, NORTH CAROLINA STATE BAR (Apr. 27, 2012), <http://www.ncbar.com/ethics/ethics.asp?page=2&keywords=engine>.

²⁰ *Id.*

E. Patent Troll Legislation

Patent Assertion Entities, or what we think of, and what are colloquially called “patent trolls,”²¹ are highly controversial entities in patent law. The question from a policy perspective is whether in fact these entities are serving the purposes of patent law when they acquire patent portfolios and then bring litigation, get a settlement, or occasionally market patents.

Yesterday, Representative Bob Goodlatte reintroduced the Innovation Act, which has bipartisan support.²² Representative Goodlatte’s bill is interesting because it attempts to increase pleading requirements so as to make it more difficult for these entities to bring suits, and have them run the risk of paying attorneys’ fees if they lose.²³ The bill also requires some transparency about who is behind a given patent.²⁴ In addition, the bill requires limited discovery to prevent some machinations in litigation.²⁵

The bill does not address the fundamental question of patentable subject matter, which some have thought is a better solution to the patent troll problem. In other words, rather than going after the trolls, why not just stop what the Electronic Frontier Foundation calls “bad patents?”²⁶ So keep an eye on this legislation as it advances in Congress over the coming months.

F. Software Patents and Trade Secrecy

Software patents are another huge issue. The Supreme Court articulated a somewhat confusing standard with regard to what to do with abstract ideas, natural law and the like, last year in *Alice*.²⁷ The Court generally articulated a two part test for abstract ideas: (1) Is the idea at issue an ineligible concept (i.e., natural law, abstract idea)? If so, (2) are additional elements sufficient to “transform” the ineligible

²¹ Colleen Chien, *Patent Trolls by the Numbers*, SANTA CLARA UNIV. LEGAL STUDIES RESEARCH, <http://dx.doi.org/10.2139/ssrn.2233041> (last updated Apr. 26, 2013).

²² Dennis Crouch, *Patent Reform: Innovation Act of 2015*, PATENTLY-O (Feb. 5, 2015), <http://patentlyo.com/patent/2015/02/patent-reform-innovation.html>.

²³ Jeff Becker, *The Latest in Patent Reform: The Innovation Act*, 26 No. 3 INTELL. PROP. & TECH. L.J. 34 (2014).

²⁴ *Id.* at 37.

²⁵ Press Release, Bob Goodlatte, Goodlatte Introduces Patent Litigation Reform Bill (Feb. 5, 2015), http://goodlatte.house.gov/press_releases/660.

²⁶ *Patent Fail: In Defense of Innovation*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/patent> (last visited May 28, 2015).

²⁷ *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2349 (2014).

concept into something patentable?²⁸

Keep an eye out for what appears to be happening already, at least anecdotally. Because of confusion regarding the standard, many innovators are being advised by their attorneys to rely on trade secrecy rather than on patents. The upshot? If trade secrecy is now going to become more prevalent than patentability, then the public will lose some of the disclosure benefits that patent law offers, which, depending upon your perspective, is not such a good thing.

G. Three-Dimensional (3D) Printing, Personalized Medicine and Patents

As long as I am mentioning patents, keep an eye out on a couple of issues that I would put merely on the radar screen now as they may not be huge issues yet. First, 3D printing and the ability of entities to copy objects may become the functional equivalent of what *Grokster*²⁹ or *Napster*³⁰ was to copyright law a few years ago.³¹ Patent infringement and patent law is about to face its *Grokster* moment as 3D printers drop in price and more people acquire them. The ease with which people might copy objects should cause a fair amount of patent owner agita in the coming years. Similarly, personalized medicine and the ability of patent law to create systems that allow for individuals to have medicine designed for them individually also raises challenging questions of patent law.³²

H. Trade Secret Law Federalization

With respect to trade secret reform, I am pleased as a trade secret law scholar to say that trade secret law is now having its day. As it has been largely ignored for many years by policymakers and scholars, I have often referred to trade secrecy as the fourth of three IP regimes because it has not garnered much attention. But over the past year, things have changed because there is a federalization effort underway led by Senator Christopher Coons of Delaware, among others³³ to deal

²⁸ *Id.* at 2350.

²⁹ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

³⁰ *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

³¹ See Deven R. Desai & Gerard N. Magliocca, *Patents, Meet Napster: 3D Printing and the Digitization of Things*, 6 *GEO. L.J.* 1691 (2014), available at <http://georgetownlawjournal.org/files/2014/08/DesaiMagliocca-Patents.pdf>.

³² See *Personalized Medicine 101, The Challenges*, PERSONALIZED MEDICINE COALITION, http://pmc.blueonblue.com/Resources/Personalized_Medicine_101 (last visited May 26, 2015).

³³ Ian Koski, *Senators Coons, Hatch Introduce Bill to Combat Theft of Trade*

with issues that the Sony hacking situation³⁴ has put front and center.

There's general consensus that the problem of corporate and state-sponsored cyber-espionage is real. The challenge is what to do about it. One proposed approach has involved trade secret law.

Trade secret law, as argued by Senator Coons and others, fails in its ability to deter cyber-espionage and state sponsored cyber-attacks on corporate networks.³⁵ Therefore, a couple of bills have been introduced because there is a belief that current federal criminal law is insufficient to deal with these issues, and trade secret law needs to be beefed up so as to fix the problem.³⁶ Recognize, of course, that trade secret law is mostly a beast of state rather than federal law, so it is unusual for Congress to act on trade secret law.

Trade secret reform is designed to give more weapons to corporate entities to deal with these issues of cyber-security. It creates some interesting private causes of action under the federal Economic Espionage Act ("EEA"),³⁷ which uses Uniform Trade Secret Act ("UTSA") definitions.³⁸ Here is what to watch (among other concerns)³⁹: like the Stop Online Piracy Act ("SOPA")⁴⁰ of a few years ago, which I was an active opponent of as well,⁴¹ these bills include an *ex parte* seizure provision that allow plaintiffs to attempt to seize a variety of information and even assets in the interest of preventing defendants from fleeing or using an allegedly-misappropriated trade secret against the competitive interest of the plaintiffs.⁴²

However, a concern is whether *ex parte* seizure power will lead to

Secrets and Protect Jobs, U.S. SENATOR CHRISTOPHER COONS OF DELAWARE (Apr. 29, 2014), <http://www.coons.senate.gov/newsroom/releases/release/senators-coons-hatch-introduce-bill-to-combat-theft-of-trade-secrets-and-protect-jobs>.

³⁴ See generally *Sony Hack Latest News*, THE HOLLYWOOD REPORTER, <http://www.hollywoodreporter.com/topic/sony-hack> (last visited May 26, 2015).

³⁵ Matthew F. Prewitt, *Trade Secrets in the Era of Cyber Breach*, INTELLECTUAL PROPERTY MAGAZINE, at 46 (Oct. 2014) available at [http://www.schiffhardin.com/File%20Library/Publications%20\(File%20Based\)/PDF/045_046-IPM_October_2014-Feat.pdf](http://www.schiffhardin.com/File%20Library/Publications%20(File%20Based)/PDF/045_046-IPM_October_2014-Feat.pdf).

³⁶ David S. Levine & Sharon K. Sandeen, *Here Come the Trade Secret Trolls*, 71 WASH. & LEE L. REV. ONLINE 230 (2015), <http://scholarlycommons.law.wlu.edu/wlur-online/vol71/iss4/3/>.

³⁷ Economic Espionage Act, 18 U.S.C. §§ 1831-1839 (2014).

³⁸ UNIF. TRADE SECRETS ACT, § 1 (amended 1985), 14 U.L.A. 369 (Supp. 1989).

³⁹ Levine & Sandeen, *supra* note 36 (discussing many concerns about the propriety and impact of the proposed legislation).

⁴⁰ Stop Online Piracy Act, H.R. 3261, 112th Cong. (1st Sess. 2011).

⁴¹ Mark Lemley, David S. Levine, & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (Dec. 19, 2011), <http://www.stanfordlawreview.org/online/dont-break-internet>.

⁴² Levine & Sandeen, *supra* note 36.

abuse.⁴³ Therefore, one of the issues that I recommend to keep an eye on is the question of how Congress deals with the potential for abuse of that right. Indeed, watch for whether the solution to that problem is even discussed.

This brings home the point made earlier: The harms associated with cyber-espionage are not disputed. There is bipartisan agreement—and again, being an opponent of bills, I agree as well—that cyber-espionage is a problem. The issue, which Congress hopefully will take up in the coming year, is not the question of what the *harms* are, but whether these bills will actually *address* those harms. Personally, I am not terribly optimistic that they will. That is not a topic for my talk, but you will hear from one of the sponsors of the bill last year who undoubtedly will argue that these bills are helpful. Keep an eye out for an answer to whether this solution will actually address the stated harms.

I. Access to Information and Trade Secrecy

Very much off the radar screen, but nonetheless an important issue is public access to information and trade secrecy. Trade secrecy is a tool of information access control in a way that you might be familiar with if you followed voting machine issues from a few years ago and the question whether those machines worked.⁴⁴ The code inside voting machines is a trade secret and the providers of those machines have said that you, the public, as well as the government in many instances, cannot know this code because to share it would cause competitive harm to the voting machine manufacturers from potential misuse.⁴⁵ This is a challenge.

When you think about these issues, consider the MEC's work on hydraulic fracturing regulation.⁴⁶ Why? Because the chemical industry has taken the position that the formula for the chemicals that they are putting in the ground is a trade secret.⁴⁷ Here is the problem: it very well may be, or at least there are arguments for it. On the other hand,

⁴³ See e.g., *id.*

⁴⁴ See David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007).

⁴⁵ *Id.* at 138–39.

⁴⁶ See *2014 Shale Gas Legislation*, SMITHENVIRONMENT BLOG (May 20, 2014), <http://www.smithenvironment.com/2014-shale-gas-legislation/>; *Fracking Chemicals: The Most Secret of Trade Secrets*, SMITHENVIRONMENT BLOG (Apr. 2, 2013), <http://www.smithenvironment.com/fracking-chemicals-the-most-secret-of-trade-secrets/>.

⁴⁷ Mary L. Lydon & David S. Levine, *Comment to the Bureau of Land Management Regarding Trade Secrecy in Proposed Rulemaking for Fracking on Federal Lands*, INFOJUSTICE, (Aug. 27, 2013), <http://infojustice.org/archives/30597>.

perhaps the public has an interest in knowing exactly what those formulas are and what the environmental, health, and safety harms and risks might be from the use of these chemicals—especially since the public bears the risks of anything that goes wrong—even if it is a trade secret. We should all be concerned about the chemical industry’s offloading of risk to a public that is kept in the dark.

This is not a very well recognized or understood issue, but I have been an evangelist on this issue for several years.⁴⁸ Active within the last few days, watch for bills coming from people like Senator Cornyn of Texas who are attempting to reform and improve freedom of information laws at the federal level, which I believe are a good thing.⁴⁹ To be clear, they are focusing on issues like speed of getting responses and what other exemptions look like.⁵⁰ They are not yet focusing on trade secrecy as an exemption to freedom of information laws, but they hopefully will.

J. International Negotiations: Trans-Pacific Partnership Agreement (TPP) and Trans-Atlantic Trade and Investment Partnership (TTIP)

Lastly, at the international level, we have two agreements that are being negotiated by the U.S. Trade Representative that have a direct impact, not just on intellectual property, but on technology policy more broadly, environmental policy, labor policy, and a host of other areas. One of them is the Trans-Pacific Partnership (“TPP”), which is being negotiated by the United States and eleven other countries, and is designed to be a “21st century trade agreement.”⁵¹ The status of that agreement is that after twenty plus rounds and ministerial meetings (there is a meeting that is ongoing in Manhattan that may be ending

⁴⁸ E-mail from David Levine, Associate Professor, Elon University School of Law, to Jody Colombie, Special Assistant to the Commission, Alaska Oil and Gas Conservation Commission (Apr. 1, 2013, 07:49 EST), *available at* <http://doa.alaska.gov/ogc/frac/fraccomments/HF28.pdf>.

⁴⁹ *See, e.g., SJC Unanimously Approves Cornyn-Leahy FOIA Improvement Act*, JOHN CORNYN, U.S. SENATOR FOR TEX. (Feb. 5, 2015), http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=84fd3c91-375f-4bbc-8469-3c3ee297fc8f.

⁵⁰ *See, e.g., DANIEL J. RICHARDSON & WENDY GINSBURG, CONG. RESEARCH SERV., R43924, FREEDOM OF INFORMATION ACT LEGISLATION IN THE 114TH CONGRESS: ISSUE SUMMARY AND SIDE-BY-SIDE ANALYSIS 4–5 2015, available at* <http://fas.org/sgp/crs/secr/R43924.pdf>.

⁵¹ *Trans-Pacific Partnership (TPP)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp> (last visited May 31, 2015). The negotiating countries are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

now), we do not know much because the TPP negotiating text has been kept from the public. Therefore, the public is engaged in a lot of guess work. Because there has been no formal release of negotiated text, it is hard to make any predictions about what TPP might look like.⁵²

The Trans-Atlantic Trade and Investment Partnership (“TTIP”) is an agreement being negotiated between the United States and the European Union (“EU”).⁵³ TTIP focuses on jobs, trade, better access to markets, and less red tape;⁵⁴ in other words, the kinds of things you would expect to come out of hopefully a successfully completed trade agreement. The eighth round of negotiations is happening right now in Brussels.⁵⁵

Unfortunately, secrecy is also an issue in these negotiations. However, the EU—as an interesting negotiating move—is starting to share some information with the public so that it might understand the EU’s positions. Meanwhile, the United States remains tight lipped.⁵⁶ I will have more to say about this in the coming months, as I will be submitting a law review article in the fall on how and why, from a theoretical and practical perspective, we can improve access to information in negotiation of trade agreements.

Here is what you want to look for from an IP perspective: One of the issues that is coming up in TPP and TTIP is increasing liability for internet access providers (“IAP”) for their arguable facilitation of copyright infringement.⁵⁷ Recognize, however, that we have laws in the

⁵² David S. Levine, *The Most Important Trade Agreement That We Know Nothing About*, SLATE (July 30, 2012), http://www.slate.com/articles/technology/future_tense/2012/07/trans_pacific_partnership_agreement_tpp_could_radically_alter_intellectual_property_law.html.

⁵³ *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited June 4, 2015).

⁵⁴ Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, (Feb. 13, 2013) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/february/US-EU-TTIP>.

⁵⁵ See *EU and US Conclude Second Round of TTIP Negotiations in Brussels*, DELEGATION OF THE EUROPEAN UNION TO THE UNITED STATES, <http://www.euintheus.org/press-media/eu-and-us-conclude-second-round-of-ttip-negotiations-in-brussels/> (last visited May 27, 2015).

⁵⁶ See *Now Online—EU Negotiating Texts in TTIP*, EUROPEAN COMMISSION <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> (last visited May 27, 2015).

⁵⁷ See Jeremy Malcolm & Maira Sutton, *Latest TPP Leak Shows US Still Pushing Terrible DRM and Copyright Term Proposals—and New Threats Arise*, ELECTRONIC FRONTIER FOUNDATION (Oct. 16, 2014), <https://www.eff.org/deeplinks/2014/10/latest-tpp-leak-shows-us-still-pushing-terrible-drm-and-copyright-term-proposals>; Maira Sutton, *TAFTA, the US-EU’s*

United States like the DMCA, Section 512 of the Copyright Act⁵⁸, and Section 230 of the Communications Decency Act⁵⁹ that create safe harbors for IAPs.⁶⁰ The United States may be pushing for countries to go after IAPs more aggressively than it would under our existing law.

As I alluded to earlier, there also seems to be an increased interest in preventing the circumvention of TPMs,⁶¹ which is a huge issue for the content industry, in particular, as consumers infringe and pirate goods. This is still an enormous problem, but less so for the music industry today than for the film industry, notwithstanding the Sony hack which obviously was enormous but did not involve copyright as much as security.⁶²

Speaking again of trade secrecy, trade secret standards might be ratcheted up to prevent whistleblowers and others from reporting on trade secrets that are made public.⁶³ A narrowing of copyright's fair use defense is also possible.⁶⁴ Within both the TPP and TTIP, the United States may be looking to export our longer copyright term.⁶⁵ On the TTIP side, there is a very interesting issue involving royalty payments⁶⁶ in radio and streaming, and investor-state dispute settlement ("ISDS") issues.⁶⁷

Trojan Trade Agreement: Talks (and Leaks) Begin, ELECTRONIC FRONTIER FOUNDATION (July 8, 2013), <https://www.eff.org/deeplinks/2013/07/tafta-us-eus-trojan-trade-agreement-talks-and-leaks-begin>.

⁵⁸ Copyright Act, 17 U.S.C. § 512 (2012).

⁵⁹ Communications Decency Act, 47 U.S.C. § 230 (2012).

⁶⁰ See 17 U.S.C. § 512 (2012); 47 U.S.C. § 230 (2012).

⁶¹ See *e.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55,687, 55,687 (proposed on Sept. 17, 2014) (to be codified at 37 C.F.R. 201.40), *available at* <https://www.federalregister.gov/articles/2014/09/17/2014-22082/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control>.

⁶² *Trans-Pacific Partnership Agreement*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/tpp> (last visited May 29, 2015).

⁶³ See David Levine, *Trade Secrecy and the Trans-Pacific Partnership Agreement: Secret Lawmaking Meets Criminalization*, INFOJUSTICE.ORG (Oct. 27, 2014), *available at* <http://infojustice.org/archives/33502> (describing and alluding to current trade secret protection standards).

⁶⁴ See ELECTRONIC FRONTIER FOUNDATION, *supra* note 62.

⁶⁵ See, *e.g.*, Ryan Merkely, *An Open Letter to TPP Negotiators: Copyright Term Extension Makes No Sense*, CREATIVECOMMONS (July 9, 2014), <http://creativecommons.org/tag/trans-pacific-partnership>.

⁶⁶ See, *e.g.*, Jeremy Malcolm, *Europe Releases its TTIP Proposals on Intellectual Property*, NCAC (Jan. 8, 2015), <http://ncac.org/author/jeremy-malcolm/>.

⁶⁷ Theodore R. Bromund, James M. Roberts & Riddhi Dasgupta, *Investor-State Dispute Settlement (ISDS) Mechanisms: An Important Feature of High-Quality Trade Agreements*, THE HERITAGE FOUNDATION, <http://www.heritage.org/research/reports/2015/02/investor-state-dispute-settlement-isds-mechanisms-an-important-feature-of-high-quality-trade-agreements> (last visited

What does ISDS have to do with IP? ISDS is a process whereby corporations and private entities can challenge states based upon their regulations and argue that those regulations failed to serve their interest.⁶⁸ It is designed, of course, to prevent abuse of private entities by governments that may want to go in that direction but it could also be used by corporations to actually challenge regulations—like more balanced IP laws—that may not serve their best interest, but might better serve the public.

In closing, it remains an exciting time to be a cyber-lawyer, and there is a lot going on in IP and technology law and policy. While the panels today may touch on many if not all of these issues, recognize this—to the extent that anyone argues that we have settled any of these questions, they are not telling you the truth. There are smart people on all sides of these issues who have substantive arguments based upon law and policy and they should pursue their ideas and present their arguments and evidentiary support, publicly. Look and hope for that public debate, and cherish it when it happens, because it happens less than it should.

As all of my current and former IP students have heard me say, I will close on this point: Anyone that tells you that they know the optimal allocation of rights and responsibilities in IP law is lying.⁶⁹ We do not know. We will see that reality continue to arise in the coming year, but I, and many other wonderful colleagues throughout the academic world, plan to do what we can to narrow the understanding gap in the coming months and years.

Thank you for your time today and I hope you enjoy the panels. Have a great day!

