

UNITED STATES PATENT OFFICE

THE INTELLECTUAL PROPERTY

BOOD

AT DUKE LAW

Center for the Study of the Public Domain

The story of Duke Law's CSPD also starts with David Lange. Professor Boyle credits Lange with framing an essential issue for intellectual property scholars in his 1981 article, *Recognizing the Public Domain*.

"He argued that scholars were focusing all of their attention on intellectual property, not focusing on the dangers of over-protecting material and impoverishing the public domain, because they assumed that it was plentiful and would always be there," explains Boyle. "He concluded 'and that, of course, is what they said about the buffalo. And where are the buffalo now?'" It is that notion of the dangers of ignoring the role of the public domain that prompted the founding of the CSPD.

"Any thoughtful intellectual property scholar would say that the balance between IP and the public domain is vital to having a vibrant, successful system for innovation, whether in culture or in inventions, yet around the world, there was not a single institution devoted to the study of the public domain," says Boyle. "It's as if we had a thousand schools of Industrial Development and not a single School of the Environment. It's not that one should restrain industrial development, but if you want to have sustainable development, you have to understand the environment as well. At its best, that is what good intellectual property policy does. Sometimes creating a property right can actually expand the public domain; without patents, for example, which require disclosure and which eventually expire, we would have to rely on trade secrets, with the risk that the invention never becomes freely available. The key thing is to make sure that the expansion of rights serves, rather than hinders, the goals of the system."

Professor Jerome Reichman agrees. "If over-protectionist intellectual property rules make it hard to get the basic inputs to innovation, it will end up hurting our own innovation efforts rather than help-

Of iBriefs, MP3s, and Public Interest: Student initiatives in IP at Duke

The explosion of scholarship and initiatives in intellectual property at Duke Law School has not come solely from the faculty; over the past four years, students have demonstrated spectacular intellectual engagement and creativity, both in and out of the classroom. Three examples follow.

IP/Cyberlaw Society's 3rd annual "Hot Topics" symposium

Peer-to-peer music file-sharing is an unquestionably "hot topic." An estimated 50 to 60 million people currently engage in file-sharing, it's the subject of numerous bills pending on Capitol Hill, and hundreds of lawsuits and criminal prosecutions are aimed at shutting the practice down. It was, then, a fitting topic for a half-day panel discussion and debate, part of the Intellectual Property and Cyberlaw Society's 3rd annual "Hot Topics in Intellectual Law Symposium" held March 26.

"The issue of file-sharing is of importance not only to the recording and music industries, but functions as a referendum on copyright law itself," said Professor David Lange in introductory remarks. "Never before our time have individuals massively confronted copyright in their everyday lives in the way that we now do." Panel moderator Raymond Ku, professor of law at Case Western Reserve University School of Law and the associate director of the Center for Law, Technology and the Arts, agreed with that assessment, noting that copyright treats creators, distributors, and the public differently.

"Peer-to-peer changes the equation. The publisher and distributor drop out of the picture and are replaced by the public," said Ku.

The student-organized panel included Dean Garfield, vice president of legal affairs for the Recording Industry Association of America, which has sued to stop file-sharing, and Jason Schultz, a staff attorney for the Electronic Frontier Foundation, who called for voluntary collective licensing as a way to compensate artists and copyright holders, without shutting down the practice. Other views came from Jim Burger, who represents technology companies on IP, communications, and government policy matters, and Mark Ishikawa, who described himself as an internet "private investigator" hired by copyright holders to detect infringers and pursue them under the Digital Millennium Copyright Act (DMCA).

"Users should have no reasonable expectations

of privacy when they are using peer-to-peer networks," said Ishikawa, adding that he can easily track down the date, time, and Internet provider address of any file exchange.

"I thought [the students] did a very professional job of bringing together people with vastly different viewpoints on a controversial issue," said participant Schultz. He said the informal contributions of Judge Randall R. Rader of the United States Court of Appeals for the Federal Circuit gave additional depth to the panel.

The file-sharing debate was followed by an exploration of the crucial issue of specificity in the language of patent claims, with the keynote address delivered by Judge Rader, a top jurist and teacher of patent law. It continued in breakout sessions led by practitioners and academics in such areas as nanotechnology, biotechnology, antitrust in software product markets, and recommendations for patent reform.

According to Grant Yang '05, past president of the IP and Cyberlaw Society, "Hot Topics" is designed to appeal to academics, practitioners, and students with diverse interests. Rising 2L David Breau, the incoming president, feels the March program succeeded well in that regard. "People were engaged and interested—attorneys as well as students."

Duke Law and Technology Review: An Online Pioneer

The staff of the *Duke Law and Technology Review* (DLTR) celebrated its final faculty approval as a permanent Duke Law School journal this spring, the last step in a four-year process.

Entirely a student initiative, DLTR takes a highly innovative approach to the law journal format, as well as to issues relating to technology and the law. Published online with over 300 regular subscribers, DLTR pioneered the iBrief, which crosses an op-ed style with a traditional journal's rigorous standards of research and analysis.

"At 10-15 pages, iBriefs are designed to be more accessible than traditional law journal

“Striking the right balance between what is protected by exclusive rights and what remains free for all to use and build upon is vital to the functioning of the IP system, and the innovation and creativity it seeks to promote.”

Jennifer Jenkins

ing them,” offers Reichman, whose work takes an international view. “As more and more innovation comes out of today’s developing countries such as China and India, it’s going to increase enormously the costs of innovation here, especially by small- and medium-sized firms who will not be able to get affordable access to the inputs they now take for granted.”

Boyle, Lange, and Reichman convened the Conference on the Public Domain in November 2001, which jump-started activity and discussion on the role of the public domain in all spheres of innovation. Attracting scholars and creators in such areas as science, history, environmental systems, art, law, software, film, and music, it represented the first large-scale inquiry into the issue of whether the trend towards expanded intellectual property rights would best stimulate innovation and investment in the face of new technologies. The consensus of concern at the conference is what led to the establishment of the CSPD at Duke in 2002, funded by a generous \$1 million gift from an anonymous donor. Boyle, Lange, Reichman, and Arti Rai all serve as faculty co-directors of the CSPD.

From the start, the CSPD has sought to highlight the public domain as an essential part of the intellectual property system. Jenkins, the CSPD’s director, puts it this way: “The Center aims to preserve the same thing—innovation—that the IP system is designed to facilitate. Striking the right balance between what is protected by exclusive rights and what remains free for all to use and build upon is vital to the functioning of the IP system, and the innovation and creativity it seeks to promote.”

Public Interest Opportunities

In recent years, Duke Law students have worked on an array of pressing public interest issues in the intellectual property area.

Through seminars that offer the opportunity to work with public interest organizations, students have participated in a series of practical projects. One of these projects—researching privacy issues on a computer operating system for the Electronic Privacy Information Center—eventually led to action by both the Federal Trade Commission and European Union. Another project allowed students to prepare and present a formal 50-page comment to the Federal Communications Commission.

This spring, during a seminar on intellectual property, the public domain, and free speech, students worked on thorough analyses of issues surrounding proposed legislation that would provide broad legal protection for databases. Their papers examined Commerce Clause limits on this legislation, existing protections for databases under copyright as well as contract law, differences between the current proposal and established misappropriation doctrines, and an in-depth study of the legal database industry’s methods for protecting its databases.

“I felt I was doing something that could actually make a difference,” says Kerri Smith, who participated in the seminar. “It was amazing what a law student could do in analyzing challenging, complex issues that were both interesting academically and important from a policy perspective.”

Working closely with Professors David Lange, Jeff Powell, James Boyle, and Fellow Daphne Keller, several students also assisted in the research and drafting of a Supreme Court *amicus* brief in *Eldred v. Ashcroft*, the case challenging Congress’ most recent 20-year extension of the copyright term. While the challenge to the term extension was ultimately unsuccessful, the *amicus* brief was cited by Justice Stephen Breyer in a strong dissent.

Students continue to perform public interest work through independent studies and research positions with the Center for the Study of the Public Domain. Several students are currently working with the CSPD’s Arts Project on articles and multimedia materials that illustrate the impacts of intellectual property law on creative processes.

“The work that they are doing involves legal analysis, but it also gathers artists’ stories and perspectives,” says Jennifer Jenkins, director of the Project. “The interdisciplinary nature of this work has allowed students with artistic backgrounds to apply these in their legal education—with great results.” ♣

articles,” says editor-in-chief Ryan King ‘05. “Any educated person should be able to read them without being bogged down by a lot of legalese, but a technology lawyer should be able to pick them up and find the pieces relevant and interesting.”

DLTR covers topics relating to intellectual property, business law, free speech, privacy, telecommunications, and cybercrime, among others. Articles currently posted at <http://www.law.duke.edu/journals/dltr> include a summary and analysis of the FCC’s new wireless local number portability rules, a review of how patent infringement cases could be affected by the “complexity exception” of the Seventh Amendment, which allows a judge to deny a jury trial in a civil case if he or she feels the issues are too complex to allow a jury to offer an informed decision, and the issue of patenting computer data structures. DLTR is attracting contributions from international practitioners, as well as students, from a broad spectrum of disciplines.

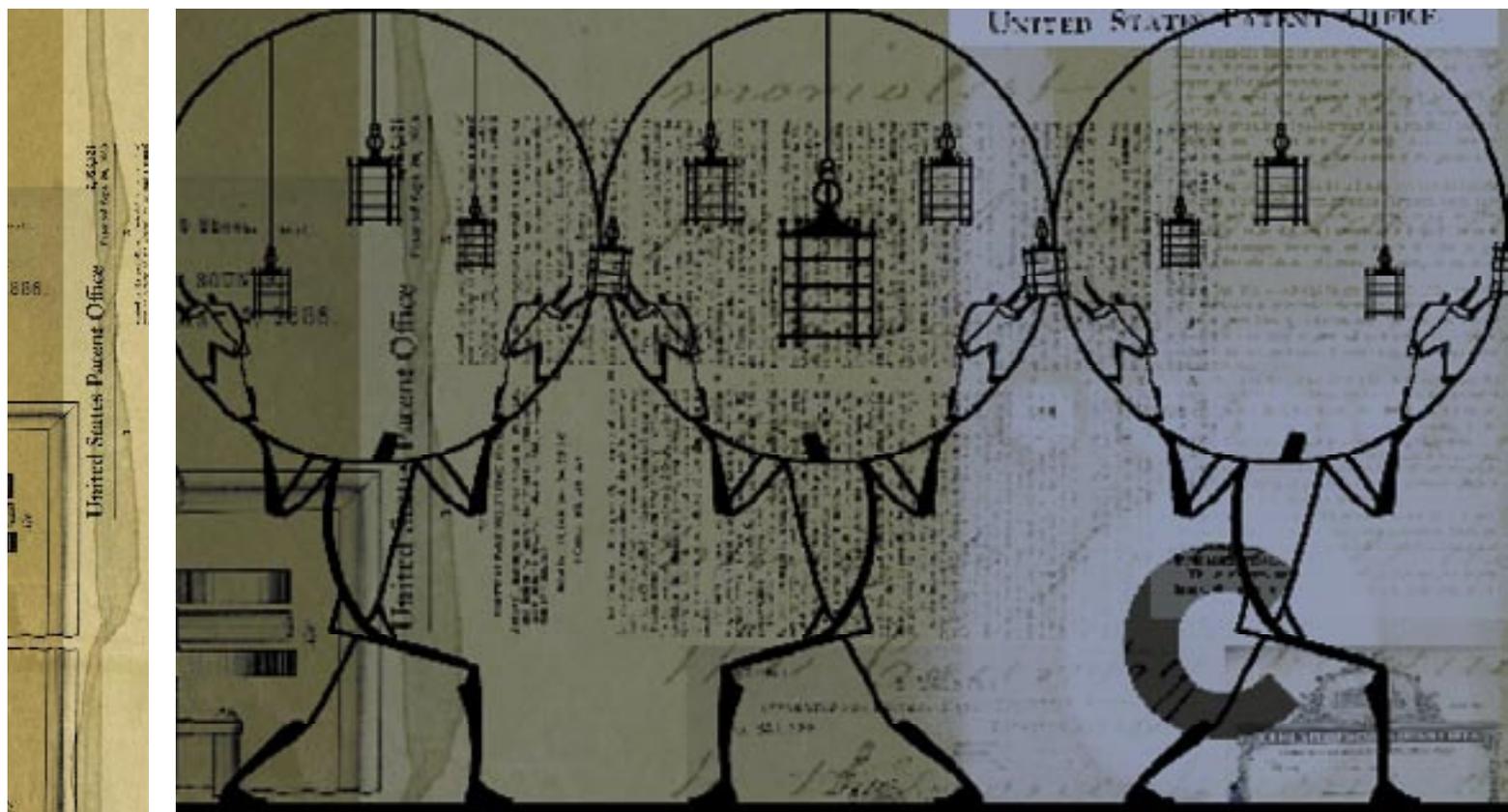
“Practitioners are starting to find us, as contributors as well as readers,” says King. “The shorter format and freer style lends itself well to their contributions.”

Continuity and frequency of publication allows DLTR to be the first to cover controversies in technology regulation, and to continue to follow the issues as they evolve, says Kerri Smith ‘05, DLTR’s managing editor.

“Traditional journals take a year to publish, so we can be the first to cover an issue,” said Smith of DLTR’s plans to publish an iBrief every two weeks throughout the academic year.

King credits the last board of DLTR with establishing a regular and frequent publication schedule, and securing approval as a permanent journal. With a vastly expanded staff, the result of an aggressive drive to recruit top 2Ls and 3Ls, King says quality will be the focus in the coming year, the goal being tightly written articles on timely issues that are put through a rigorous 10-step editing process.

“There are very few all-electronic journals in law. DLTR was one of the first and immediately set high standards both for its innovative approach and the quality of its writing,” says Richard Danner, senior associate dean for information services and Archibald C. and Frances Fulk Ruffy Research Professor of Law. “As a largely student-written journal, DLTR counters the trend of most law journals to publish fewer student contributions, thereby increasing the value of participation for Duke Law students. The journal ties in directly with the Law School’s academic priorities, and it was an easy matter for the faculty to grant final approval last year.”



CSPD events: from international trade to documentary film

Just as there are intricate, reciprocal connections among natural systems—changes in one often spur reactions elsewhere—so are there intricate connections in areas traditionally governed by intellectual property rights. One major success of the CSPD has been exploring those connections through interdisciplinary conferences, meetings, an ongoing lecture series, and continuing research.

In April 2003, the CSPD hosted the Conference on International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime, a major conference on the harmonization of international IP rights since the TRIPS Agreement of 1994. Organized by Jerome Reichman and Keith Maskus, professor and chair of the Department of Economics at the University of Colorado at Boulder, and primarily funded by the Rockefeller and John D. and Catherine T. MacArthur Foundations, the conference brought together legal scholars, economists, and political scientists to address the proper

balance between private and public rights and interests in an incipient transnational system of innovation, to serve both developing and developed economies. Of particular focus were issues relating to the ability of governments to provide such critical public goods as health, education, and environmental protections in a global regime that increasingly relies on massive privatization of technical inputs.

Papers presented at the conference have resulted in this summer's Symposium issue of the *Journal of International Economic Law* and a collection, *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, forthcoming from Cambridge University Press. The conference was successful in raising the visibility of a wide range of policy issues, some of which have been pursued in subsequent international meetings.

Proliferating property rights and their effects on arts and culture are the focus of the CSPD's Arts Project, which in April 2004 hosted a conference called "Framed!: How Law Constructs and Constrains Culture." Held in conjunction with "Full-Frame," one of the nation's leading docu-

mentary film festivals, it was a forum for lawyers, musicians, and world-renowned documentarians to discuss the increasing conflict between copyright and creativity. Panel discussions explored issues such as hurdles faced by filmmakers in clearing rights and renewing limited licenses for images and music, and how the line between permissible borrowing and theft in music has shifted in recent years.

In 2003, the CSPD also launched an interdisciplinary lecture series on "The Information Ecology," which has featured presentations by scholars from Duke and around the country on innovation economics, genomics, telecommunications, media policy, electronic privacy, and a variety of other subjects. Upcoming speakers in the Information Ecology series include James Love, director of the Consumer Project on Technology, who will speak about alternative ways of funding research and development that would promote access to essential medicines.

The breadth of the CSPD's approach yields both theoretical and practical benefits. "One of the real advantages has been the wealth of detail it has generated about

“Diverse as all these projects are, there is a common theme here, a Duke signature: great scholarship translated into policy proposals that actually make the world a better place.”

Dean Katharine Bartlett

the way intellectual property actually works in different areas of creativity,” explains Boyle. “This not only leads us

to a better understanding of innovation, but it is also practically fascinating because of the possibilities for productive transplants: There may be practices in one area, say in music or software, which inspire you to wonder whether an approach like that could work in science or medicine. Arti Rai’s work on open-source drug discovery, which borrows ideas from software development, is one example. Jerry Reichman’s comprehensive study of compulsory licenses in different areas of industry is another. The idea is really the stitching together of issues raised across cultural and scientific arenas. That gives you practical insights, which in turn gives you more theoretical insights—it’s a dialectic, a back and forth process where you get a more sophisticated understanding of both.”

Major developments in public genomics and access to medicines

The CSPD’s activities in the areas of science, health, and distributive justice got two major boosts in 2004.

First, partly due to a generous \$100,000 donation from an anonymous donor, the CSPD was able to collaborate with Duke University’s Center for Genome Ethics, Law and Policy (GELP) and the Sanford Institute to set up the Program on Global Health and Technology Access, to be directed by Dr. Anthony So. (See related story page 36.) The program will work to solve patent problems impeding drug development and distribution.

“Our goal is to provide the global poor with better and more affordable access to essential medicines such as HIV/AIDS drugs,” states So. Related projects will

CSPD
<http://www.law.duke.edu/cspd>

Framed!
<http://www.law.duke.edu/framed>

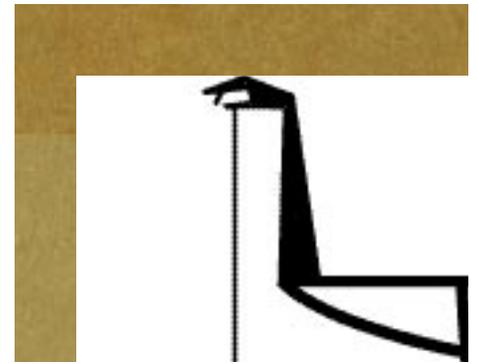
include Professor Rai’s open-source approach to inventing drugs that fight tropical diseases. (See related story page 30.)

Second, a number of

Duke Law faculty were part of an extremely ambitious, five-year, \$5 million grant application to the National Institutes of Health and the Department of Energy, for the “Centers of Excellence” Program in Ethical, Legal and Social Aspects of the Human Genome. The grant, which was coordinated by Dr. Robert Cook-Deegan, director of GELP, is expected to result in the establishment of a Center for the Study of Public Genomics at Duke and designation of Duke as one of the prestigious national Centers of Excellence. The new Center will focus intensively on the effects of intellectual property on genomic research, development and medicine. Its projects will include Professor Rai’s application of open-source data sharing to genomics research, and Professors Reichman and Lewis’ research on promoting scientific innovation with compensatory liability rules. (See related stories, pages 28, 30, 33.)

From science to music, from film to genomics, the profusion of activities can be almost dizzying. David Lange’s virtuoso one-man band is now at least a string quartet and well on its way to being a full orchestra. In the process, the development that Lange masterminded has really exceeded expectations.

“We are very proud of what the intellectual property program has achieved,” says Dean Bartlett. “Diverse as all these projects are, there is a common theme here, a Duke signature: great scholarship translated into policy proposals that actually make the world a better place.” ♪



COLLECTED PAPERS FROM CSPD CONFERENCES

Collected Papers: Duke Conference on the Public Domain, 66 Law & Contemp. Probs. (2003)
<http://www.law.duke.edu/journals/lcp/indexpd.htm>

Selected Papers: Conference on International Public Goods and the Transfer of Technology Under a Globalized Intellectual Property Regime, 7 J. Int’l Econ. Law, Issue 2 (2004)
http://www3.oup.co.uk/jielaw/hdb/Volume_07/Issue_02/

INTERNATIONAL PUBLIC GOODS AND THE TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME, Ed. Maskus and Reichman (forthcoming from Cambridge University Press, 2005)

