2020

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Southern Methodist University, Dedman School of Law, Tsai Center for Law, Science and Innovation

SMU | Tsai Center for Law, Science and Innovation
DEDMAN SCHOOL OF LAW

Tsai Today

EXPLORING HOW LAW AND POLICY AFFECT TECHNOLOGY AND SCIENTIFIC RESEARCH

AUGUST 2020

INSIDE

Prof. Taylor Goes to Washington

PROFESSOR David O. Taylor is even-tempered and unfailingly polite. A Harvard Law School grad with a mechanical engineering degree from Texas A&M, it's hard to imagine him ranting.

But Taylor, a professor in SMU's Dedman School of Law, minces no words when the subject turns to what he, among many experts, sees as the U.S. Supreme Court's treatment of patent law's eligibility requirement. He's deeply troubled by Court decisions on point over the past decade.

The 43-year-old Taylor, a former patent litigator with Baker Botts in Dallas, is a nationally-recognized authority on patent eligibility, the body of law governing which inventions qualify for patent protection. He's published a half-dozen law review articles on the subject and presented talks on the subject at law schools from New York to California. He's also testified in Congress about the need for reform.

SEE WASHINGTON ON PAGE 4

Do's and Don'ts from the pros

Tsai Center Welcomes Federal Circuit to SMU

SMU Dedman School of Law students got a firsthand look at federal appellate arguments—and invaluable advice on what to do (and not do) during those arguments—when the U.S. Court of Appeals for the Federal Circuit brought its docket to the Hilltop.

On Oct. 1, 2019, a three-judge panel of the court heard oral arguments in two patent cases, one trade case, and one veterans case. These arguments took place in the Hillcrest Appellate Courtroom before an overflow crowd of SMU students, faculty, staff, and alumni, as well as members of the public.

The court, based in Washington, was created by Congress in 1982 with the merger of the U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims. It is the only appellate court below the U.S. Supreme Court with jurisdiction to hear appeals in patent cases.

The hearing came during the Federal Circuit's first-ever visit to Dallas. Similar road shows have taken place in prior years in Chicago, New York, Los Angeles, Boston, Baltimore, and Philadelphia. In addition to

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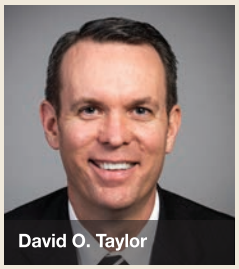
From the Co-Directors


W. Keith Robinson


David O. Taylor

THE TSAI CENTER had an eventful 2019-2020 academic year. We hosted the U.S. Court of Appeals for the Federal Circuit and the Chief Judge of the Patent Trial and Appeal Board. We sponsored symposia considering the legal implications of CRISPR gene editing and the relationship between innovation and IP. We held Tsai Talks discussing art law, cryptocurrency, autonomous driving, trademarks, and entrepreneurship. We launched Fed Circuit Blog, a major initiative providing transparency and commentary regarding the only appellate court in the United States hearing appeals in patent cases. And we supported our existing patent, trademark, and small business clinics.

Then the pandemic hit. We responded by sponsoring students working in a new summer clinic providing assistance and resources for people dealing with legal problems caused by COVID-19. Going forward, we will hold a series of presentations exploring intersections of COVID and the law, including public health law, constitutional authority to impose restrictions on businesses and individuals, voting rights, FDA approval of drugs and vaccines, tax and spending legislation, renters' rights, domestic violence due to stay-at-home orders, immigration, labor and employment law, and patents and diagnostics. We also plan to hold our annual events, including our Innovation and Leadership Lecture Series, Tsai Talks, and symposia. We will hold these events in-person and online as circumstances dictate. Follow us on Twitter @SMUTsaiCenter for updates on how to join us!

W. Keith Robinson and David O. Taylor
TSAI CENTER CO-DIRECTORS AND ASSOCIATE PROFESSORS OF LAW

CENTER UPDATE

Tsai Center Launches Fed Circuit Blog

In conjunction with the Federal Circuit's visit in October, the Tsai Center launched Fed Circuit Blog. Located at fedcircuitblog.com, this website provides comprehensive coverage of the only court in the United States that hears appeals in patent cases. Given the impact of patents on the development and use of technology, the court holds an important place in the innovation ecosystem.

Fed Circuit Blog aggregates data related to the court's cases, providing one resource for information related to opinions, en banc cases and petitions, cases with amicus briefs, and decisions subsequently challenged at the Supreme Court. It also provides timely news reports and discussion of relevant scholarship.

"The goal is to provide transparency," Tsai Center Co-Director David O. Taylor stated in a press release announcing the launch.

According to Tsai Center Co-Director W. Keith Robinson, "For those interested in the Federal Circuit, the blog will be an invaluable tool."

"We hope Fed Circuit Blog will serve as an important resource for anyone interested in law, science, and innovation," Prof. Taylor added.

This project is the result of two years of preparation and significant ongoing work supported by the Tsai Center.

Symposia

ChIPs Luncheon Addresses Social Media

● **A panel of women** prominent in the fields of technology, law, and policy took part in a discussion at SMU Dedman School of Law on the emerging topic of "Innovation and Regulation in the Age of Social Media."

The discussion formed the centerpiece of an October 10, 2019, ChIPs luncheon hosted by the Tsai Center for Law, Science and Innovation. ChIPs (Chiefs in Intellectual Property) is a nationwide nonprofit organization founded in 2005 by seven female IP executives to advance the career prospects of women in innovative fields.

Panelists included Dama Brown, Southwest Regional Director of the Federal Trade Commission; Michelle Park, Chief Marketing Officer for Frédéric Fekkai, an international hair-care products manufacturer; and Brittany DeGan, General Counsel for rewardStyle, a company that brings together brand holders and leading online "influencers," people who command large, potentially valuable social-media audiences.

The rise of social media, the panelists explained, has dramatically changed the ways businesses engage with their customers and strive to achieve a commanding market position. Influencers, and the companies whose products and services they promote, have created new, unconventional business models outside traditional advertising avenues. They have also presented unique regulatory challenges for those agencies whose mandate is to protect consumers.

"We have an obligation," Brown said, "to make sure marketers and influencers are not employing deceptive practices," such as surreptitious arrangements to pay for laudatory mentions on social media. Influencers, she said, should be required to disclose financial ties to the companies they write about. But, she added, "in the absence of federal regulation" specifically requiring such disclosure, "there are a lot of challenges there. . . . We all need to work harder for more clarity."

DeGan said the present "patchwork of regulations" and requirements from state to state and country to country imposes "overly burdensome" demands on marketers, especially those whose products are sold globally.

While social-media platforms are new, Park added, the basics of selling worthwhile products ttrusting customers are not. "If your brand is strong, if your brand has a good story to tell, we'll find a good way to tell it," she said.

SMU and the Tsai Center look forward to hosting more events involving ChIPs and other groups advancing the career prospects of underrepresented groups in innovative fields.

TSAI TALKS

The Tsai Center hosts Tsai Talks, presentations and discussions focusing on real-world examples of the practice of law. Last year's Tsai Talks included:

● **Art Law and Copyright: How a Small Firm Takes on National Cases:** Tom Maddrey '14, founder of Maddrey PLLC, a boutique art law and intellectual property firm, kicked off our Tsai Talk calendar with an engaging discussion of art law, discussing counterfeiting, art theft, and the Supreme Court's recent copyright cases.

● **Tales from the Crypt(o): How Cryptocurrency is Resurrecting the Legal Market:** Lacey Shrum, an associate at Vela Wood assisting blockchain and cryptocurrency businesses, founded her own company, Smart Kx, which uses blockchain to create self-executing contracts. She spoke about changes in technology, her work as an attorney addressing cutting-edge technologies, and the origin of Smart Kx.

● **IP in the Sky: Uber Elevate and Autonomous Driving Technology:** Chris Storm manages Uber's intellectual property portfolio relating to emerging technologies. After describing Uber's aerial ride-sharing program and autonomous driving technologies, he discussed IP challenges unique to companies on the forefront of technological change. He also gave advice to students interested in careers with technology companies.

● **Entrepreneurship and the Law:** Bill Chinn, CEO for The DEC Network, a non-profit that helps entrepreneurs in Dallas, and Roman Ross, owner of Esslinger Investments and a former CEO of CompUSA, discussed the value of using a law degree in the business world, the current state of entrepreneurship in Dallas, and legal difficulties entrepreneurs face when starting businesses.

● **Leggo my Logo!** Charles Phipps and Joe Unis, partners at Locke Lord, discussed how trademark law applies in real world industries, including sports trading cards, real estate, insurance, and designer accessories. They also shared a few trademark-related war stories.

Cover Stories

Washington

CONTINUED FROM THE COVER

Here's a sampling from his written analyses of the Supreme Court's handiwork. "A questionable understanding of historical precedent," he said, discussing one of the first seismic patent-eligibility cases from 2012. "Unilluminating," he said of another, 2014 opinion discussing the present eligibility standards.

"A mystical mystery." "Indefensible." "Untenable." "Reflects a lack of understanding." "Confused." "Misguided." "Vague and subjective." "Critical flaws." "Perverse impact." "Devastating consequences." "Incoherence." "A raft of unanswered questions." "Clearly wrong."

In other words, the Court has stuck us with patently bad patent law. So bad, Taylor says, that Congress should step in to fix the mess.

Perhaps responding to his calls for reform, Congress invited him to Washington to testify before the Senate Judiciary Committee's Subcommittee on Intellectual Property on June 4, 2019.

"Patent law," he began his testimony, "is in a state of crisis… There is intense dysfunction with respect to the law of patent eligibility." And "the crisis," he explained, "is one of confusion and incorrect results leading to reduced investment in innovative efforts."

The Court, he told the subcommittee, "has embarked upon a drastic and far-reaching experiment" to rewrite patent-eligibility law. Step by step, Taylor said, the Court had replaced familiar legislative, administrative, and judicial guidance with new requirements that "significantly increased" the odds that an array of technological innovations would be deemed ineligible for patents. This, in turn, has shrunk the pool of investment dollars for research and development, including investment in new drug therapies, he said.

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Federal Circuit

CONTINUED FROM THE COVER

SMU, the judges heard cases at the Earle Cabell Federal Building and U.S. Courthouse in downtown Dallas and Texas A&M University School of Law in Fort Worth.

The Tsai Center invited the Federal Circuit to Dallas, enlisting the support of the U.S. District Court for the Northern District of Texas, the Texas Regional U.S. Patent and Trademark Office, the Intellectual Property Law Section of the Dallas Bar Association, the Barbara M.G. Lynn American Inn of Court, and Texas A&M University School of Law. The Tsai Center provided logistical support for the Court's visit to SMU.

After watching the oral arguments, SMU students gained valuable insights on appellate advocacy during an informal question-and-answer session. The three appellate judges offered several candid tips on the dos and don'ts of presenting an effective appellate case:

DO: Be civil.

■ Chief Judge Sharon Prost, when addressing the lawyer for one party, referred to the opposing party as "your friend." ("Your friend said that particular case is not the governing precedent here. Tell us why she is wrong.") Prost said she borrowed this practice from Chief Justice John Roberts of the U.S. Supreme Court. "It reflects his view on how members of the bar ought to treat one another," she said.

DON'T: Be obnoxious.

■ "There is no reason ever to call someone a liar in a brief," Judge Evan J. Wallach said.

■ "We want facts, not what you think," Prost said. "My two least favorite words in briefs are 'frivolous' and 'outrageous.'"

DO: Be prepared. Very, very prepared.

■ "Prepare in exhaustive detail," said Judge Todd M. Hughes. "Know every aspect of your case."

■ "The secret to success in everything," said Wallach, "is really, really, really hard work."

DON'T: Try winging it.

■ "I read every brief at least twice, and sometimes three times," Wallach said. If there's a flaw or a gap in a pleading, the court will surely spot it, he explained.

DO: Answer judges' questions.

■ "Arguments are our time, not yours," Prost said.

DON'T: Evade questions.

■ "We will force you to answer, one way or another," Hughes added.

DO and DON'T: Know the time and place for humor.

■ "It's dangerous to make jokes to an appellate court, but, once in a while, it's okay," Wallach said.

■ "Always laugh at the judges' jokes," Prost added, which, perhaps unsurprisingly, elicited laughter from the audience.

Following the question-and-answer session, Prost, Wallach, and Hughes joined students and other members of the audience for a reception in honor of the court and the judges' service to our nation.

Spotlight

Annual Symposium Focuses on Impact of IP on Innovators and Vice Versa

THE NEXUS between intellectual property law and creative endeavors—from designing software to curating museum collections, from cutting-edge cancer treatments to the music of Taylor Swift—was the theme of SMU's 16th Symposium on Emerging Intellectual Property Issues, hosted by the Tsai Center in February.

The daylong symposium, titled "Opportunities and Challenges in Creative and Innovative Industries," brought together prominent academics, legal practitioners, entrepreneurs, and executives from fields as diverse as biotechnology, education, fashion, and entertainment.

In panel discussions, participants assessed the latest trends, controversies, judicial decisions and legislative initiatives in intellectual property law, and their impacts on businesses built on creativity and innovation.

"The idea is to explore the impact of changes in technology and the law on innovators," David O. Taylor, Co-Director of the Tsai Center and Associate Professor of law at SMU, said in opening remarks.

The topics were as intriguing as they were varied: how software, while ubiquitous in our lives, defies neat categorization under traditional doctrines of patent and copyright law; why some creators and innovators encourage infringement of their copyrights; how race, gender, and class biases affect the market for fine art; how, while the U.S. Supreme Court has muddled the law on patent eligibility, there's no easy consensus on whether or how Congress should intervene to fix it; and what recourse a mom-and-pop business has when it learns that one of its biggest customers has been stealing its intellectual property.

Donald S. Passman, a Beverly Hills entertainment lawyer whose client list is a Who's Who of music megastars, including Taylor Swift and Adele, delivered the keynote address.

SPEAKERS

- Ann Bartow, University of New Hampshire Franklin Pierce School of Law
- Shannon Bates, Harper Bates & Champion LLP, SMU Dedman School of Law
- David W. Carstens, Carstens & Cahoon LLP, SMU Dedman School of Law
- Tom Clees, Recording Industry Association of America
- Gerardo Con Diaz, University of California, Davis
- Russell Farr, Caris Life Sciences
- Kristelia García, University of Colorado Law School
- Ellen Harris, DynaStudy Inc.
- Justin Hughes, Loyola Marymount University Loyola Law School
- Sharon Israel, Shook, Hardy and Bacon LLP
- Rae Liu, DC International, Leatherology
- Adam Mossoff, Antonin Scalia Law School, George Mason University
- Donald S. Passman, Gang, Tyre, Ramer, Brown & Passman Inc.
- W. Keith Robinson, SMU Dedman School of Law
- Robert Sachs, Robert R. Sachs PC
- Hans Sauer, Biotechnology Innovation Organization
- David O. Taylor, SMU Dedman School of Law

Passman, who grew up in Dallas, authored *All You Need to Know About the Music Business*, which the *Los Angeles Times* once called "the industry bible." Passman discussed how he recently updated it to address how digital streaming has upended the music industry's long-established business models.

Until recently, Passman noted, a musician monetized her creative work by selling something, be it a wax cylinder, a piano roll, a vinyl album, or a CD. The sale of a record generated the same revenue whether the buyer listened to it once, a hundred times, or never. And to get one song he liked, a buyer was usually forced to pay for a dozen other songs.

Now, musicians monetize music not based upon how many records they sell, but by how many times listeners stream their digitally distributed songs. Passman explained that disbursement of "money is based on ears. . . . It's number of plays, versus number of users." That shift, he said, has transformed the way music is recorded, packaged, distributed, marketed, and consumed—the very "ecosystem of the business."

He compared his role as a musicians' lawyer to that of a translator, fluent in the languages of both artists and industry executives. The two sides need each other, he said, their differences aside.

"If there's no creativity, there's no business, and if there's no business, there's no creativity," he explained. "They must co-exist, but there's always conflict... I like being at the very center of that."

Faculty Updates

Chris Jenks: The Department of Defense cited Prof. Jenks for his work with the Defense Innovation Board on *AI Principles: Recommendations on the Ethical Use of Artificial Intelligence by the Department of Defense*. He organized and moderated a talk at SMU by Australian law professor Rain Livoja on the Australian military's efforts to understand the social dimension of military robotics. Prof. Jenks also testified before the Helsinki Commission as part of its inquiry into artificial intelligence, unmanned aerial vehicles, hypersonics, and autonomous systems.

Tom Mayo: Prof. Mayo co-authored *"To Shield Thee From Diseases of the World": The Past, Present, and Possible Future of Immunization Policy* with Wendi Rogaliner '95 & Elicia Green '18. He also continued his work with the North Texas Mass Critical Care Task Force, which developed hospital triage guidelines. During the coronavirus pandemic, he assisted hospitals implementing those guidelines and providing public education about triage principles during a time of health-care resource scarcity.

Carla Reyes: Prof. Reyes published *(Un) Corporate Crypto-Governance* in the Fordham Law Review and accepted an offer to publish *Autonomous Business Reality* in the Nevada Law Journal. She is working on two casebooks: one pursuing an experiential approach in the area of business organizations and another (the first of its kind) exploring the intersection of artificial intelligence and the law. She is also creating a smart contract-based prototype of UCC Article 1 filings using a natural language programming.

W. Keith Robinson: Prof. Robinson discussed the Internet of Things at the Southeastern Association of Law Schools Conference, organized a panel titled *Intellectual Property for Entrepreneurs* at Black Communities: A Conference for Collaboration, and discussed his Designing Legal Apps class at the TI:GER Innovation Conference at Emory University. He presented research on the impact of artificial intelligence on patenting at the Texas A&M IP Scholars Roundtable and the IP Scholars Roundtable at the University of New Hampshire. He published *Using Interactive Inventions* in the DePaul Law Review and presented it at Washington and Lee University. He will publish *Access to the Patent System* in the Nevada Law Journal.

Meghan Ryan: Prof. Ryan's research focuses on the impact of evolving science, technology, and cultural values on criminal convictions and punishment and civil remedies. Her recent and forthcoming publications include *The Eighth Amendment and Its Future in a New Age of Punishment* (Cambridge U. Press); *Science and the Eighth Amendment* (book chapter); *Eighth Amendment Values* (book chapter); *Secret Conviction Programs* (Wash. & Lee L. Rev.); *Escaping the Fingerprint Crisis: A Blueprint for Essential Research* (U. Ill. L. Rev.); and *Secret Algorithms, IP Rights, and the Public Interest* (Nev. L.J.).

David O. Taylor: Prof. Taylor published testimony he provided to the United States Senate Judiciary Committee's IP Subcommittee, interviewed USPTO Director Andre Iancu for an event held by the Dallas Bar Association, and accepted an offer to publish an article analyzing ethical and moral concerns with patents. Last year he served as Treasurer of the Dallas Bar Association's IP Law Section, helping to raise over $25,000 to fund scholarships for local IP law students. The University will promote him to Professor of Law on September 1, 2020.

Jenia Turner: Prof. Turner published *Managing Digital Discovery in Criminal Cases* in the Journal of Criminal Law and Criminology and had *Transparency in Plea Bargaining* accepted for publication by the Notre Dame Law Review. She is examining the use of videoconferences to conduct criminal proceedings during the coronavirus pandemic. She will survey practitioners to assess how videoconferencing affects fairness and truthseeking.

THE TSAI CENTER WELCOMES PROF. CARLA L. REYES

SMU Dedman School of Law recently announced the appointment of **Carla L. Reyes** as an Assistant Professor, joining the school this fall. She will teach Secured Transactions and courses related to law and technology and join the Tsai Center's Executive Board.

Recently named by the American Bar Association Legal Technology Resource Center as one of the "Women of Legal Tech 2020," Prof. Reyes is a nationally recognized leader at the intersection of business law and technology. She comes to SMU from Michigan State University, where she served as an Assistant Professor and Director of the Center for Law, Technology & Innovation. At MSU she taught Business Enterprises, Technology Transactions, Artificial Intelligence & the Law, and Blockchain Law & Policy and served as a Faculty Fellow at MSU's Hub for Innovation in Teaching and Learning. Prior to teaching, she practiced law in the Blockchain Technology and Digital Currency group at Perkins Coie LLP.

A former Fulbright Scholar, Prof. Reyes has pursued her research as a Faculty Associate at the Berkman Klein Center for Internet & Society at Harvard University. She contributes to blockchain technology initiatives at the United Nations Internet Governance Forum, the American Bar Association, and the Coalition of Automated Legal Applications.

Alumni Spotlight

Combining a love of technology and law

PRACTICING LAW isn't rocket science. But **Bart Showalter** (J.D., '93) is living proof that a career in one can lead to great success in the other.

Showalter, a Partner and Executive Committee member with Baker Botts L.L.P., is the former chair of the firm's Intellectual Property Department, where, for 12 years, he supervised the firm's 175 IP attorneys and professionals.

He came to the job—and to a career in law—in a somewhat roundabout way.

Showalter, who grew up in University Park near SMU, graduated from Highland Park High School before heading east to college at the prestigious Massachusetts Institute of Technology, where he earned both his bachelor's and master's degrees in aerospace engineering.

Upon graduation, he was hired in 1988 by LTV Aerospace and Defense Co.

"I got to work on some really cool projects," he says. "That was the Reagan era, and we had a contract to do this super-advanced Star Wars defense work. I was working on a 'kinetic energy interceptor' missile program. Basically, it was a way to blow up incoming missile warheads before they could detonate on U.S. soil."

From an aeronautical engineering standpoint, the work was highly complex and challenging—but from a human standpoint, it left something to be desired.

"I spent all day by myself in a cubicle," he remembers. "I'd enter data into a computer terminal, which was hooked into a master computer somewhere else, then come in the next morning to see if my simulated missile took out the warhead. It was a pretty impersonal existence, really."

"I decided to go to law school because I thought it would be a way to use the creative side of my brain, my communications skills, as well as my technical skills. MIT taught me to think like an engineer. But could I also learn to think like a lawyer?"

"To be able to translate between two worlds, the technical and the everyday, just gives you a huge advantage. It opens up for you a much broader range of possibilities."

— BART SHOWALTER, J.D. '93

His enrollment in Dedman Law was a return, of sorts, to familial roots. Showalter's father Larry, who died in 2017 at the age of 82, was a star on the 1956 SMU men's basketball team, the only Mustangs team in history to advance to the NCAA's Final Four. Larry met his wife Arden when both were freshmen at SMU, and Arden served as the school's Career Center director for 20 years.

At MIT, Showalter cultivated an interest in writing. "They offered nine writing courses, and I took every one of them," he says. "My engineering friends said, 'Why in the world would you want to take classes where you have to write?' But I found that writing was a way to express and develop my creative side, as well as my analytical, aeronautical engineering side."

"And once I got to law school, I realized that if you have some specialized knowledge, a particular technical or legal expertise, and you can write, you'll have a real advantage in the workplace. You'll be able to communicate that specialized knowledge and put it to use in ways that others can't."

"To be able to translate between two worlds, the technical and the everyday, just gives you a huge advantage. It opens up for you a much broader range of possibilities."

At SMU, he says, he discovered "this amazing new area of law called intellectual property," where he could use what he'd learned about technology and apply it to what he was learning about law.

"IP had been a sort of a backwater practice," he says. "There just weren't a lot of legal practitioners out there who had the training to think like a lawyer and like an engineer and—at the same time—be able to communicate clearly about all the important issues emerging at the intersection of law and business and technology."

SMU's Tsai Center for Law, Science and Innovation, he says, is doing future lawyers and their clients a great service by training lawyers "to be able to function effectively at the intersection of law and technology, and the intersection of law and business."

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Alumni Spotlight

Showalter

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He adds: "It's great to be training brilliant lawyers to know their way around a brief or a courtroom. But it's even better if they also know their way around the client's technology and balance sheet."

Showalter, now 55, has a lifelong passion for teaching. A longtime adjunct professor at Dedman Law, he says he's enjoyed sharing his experiences with students from kindergarten through graduate school.

"Once I got to law school, I realized that if you have some specialized knowledge... and you can write, you'll have a real advantage in the workplace."

— BART SHOWALTER, J.D. '93

An avid theatergoer, he's a past board member of the Dallas Theater Center. He also serves on the Board of Trustees of the Georgia O'Keeffe Museum in Santa Fe, a position he happened into not only because of his appreciation for Southwestern art, but also to help the O'Keefe Museum patent and commercialize a technology for shipping valuable artworks in a way that minimizes potentially harmful vibrations.

When he's not at his Baker Botts office in Dallas, he enjoys telecommuting—and bass fishing—from a family lake house in East Texas. He's accomplished at cooking Italian cuisine, "including epic pizzas from my wood-burning pizza oven," and he's a diehard Texas Rangers fan who claims a possible distant relationship to Buck Showalter, the team's former manager. When he's not in Texas, Showalter and his wife Elizabeth spend as much time as they can at their fly-fishing river retreat in Colorado.

Throughout a lengthy telephone interview, Showalter could not have been more patient and cordial. He did, however, subtly convey that just as soon as the interview was concluded, more rewarding pastimes awaited just outside his window.

"A big fish just jumped in my lake," he said.

Tsai Digest

STLR Symposium on Human Gene Editing

What are the legal, medical, economic, and ethical implications of human gene editing? The Tsai Center sponsored the *SMU Science & Technology Law Review*'s most recent symposium addressing these profound topics. Entitled "CRISPR and Me: How CRISPR Gene Editing Affects the Human Race," the symposium focused on an emerging—and controversial—biotechnology that can be used to find and alter a specific bit of DNA inside a cell, and to do so cheaply and easily.

The event brought to the law school two of the nation's leading authorities on reproductive technology and the law: June Carbone, who holds the Robina Chair in Law, Science and Technology at the University of Minnesota Law School; and Naomi Cahn, the Harold H. Greene Professor of Law at the George Washington University Law School. Separately and as collaborators, the two have written several books and articles on family law, feminist jurisprudence, assisted reproduction, and bioethics.

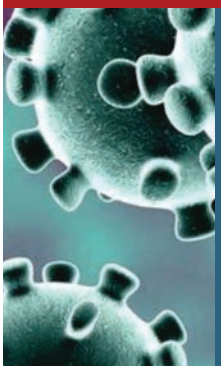
Tsai Center Executive Board member Nathan Cortez, SMU's Adelfa Botello Callejo Endowed Professor of Law in Leadership and Latino Studies, moderated a panel discussion involving Carbone and Cahn. Cortez's research focuses on, among other subjects, health law, emerging markets in health care and biotechnology, medical tourism and other cross-border health markets, and regulation of innovation under aging governmental frameworks.

The speakers unanimously recognized the promise and perils of rapid advances in human gene editing. CRISPR technology, they stressed, offers the potential to treat genetic diseases, including cancers, blood disorders, cystic fibrosis, and muscular dystrophy. At the same time, the speakers recognized widespread concern that gene editing might be used for non-therapeutic purposes—so-called "human enhancement." As one example, the panelists discussed how editing changes made in "germline," or embryonic, DNA pose significant ethical concerns, because these changes will thereafter be passed down to future generations. Parental consent for such editing would affect not just a couple's child, but that child's children, and the children of those children, ad infinitum.

"It's not new for technology to outpace legislation and regulation," Cortez said, "but the stakes here are different."

Articles authored by Carbone and Cahn addressing these points will appear in an upcoming issue of the *SMU Science & Technology Law Review.*

SUPPORT FOR SMU COVID-19 LEGAL HELPLINE



This summer the Tsai Center sponsored three financial awards for students working for the new SMU Dedman School of Law COVID-19 Legal Helpline. This helpline offers free legal assistance to North Texas residents with COVID-19-related legal problems relating to housing, consumer, employment, and immigration law. Besides helping others during this difficult time, SMU law students gained real-world legal experiences during a season when their previous summer employment opportunities became unavailable due to the COVID-19 pandemic. The free helpline is 214-SMU-COVID.

Cover Story

Washington

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Historically, patent law has recognized that laws of nature, natural phenomena, and abstract ideas are not patentable, since they are, as one 1972 Supreme Court opinion put it, "the basic tools of scientific and technological work." An oft-cited example is that Newton could not have patented the law of gravity. Since all inventions, to one degree or another, "embody, use, reflect, rest upon, or apply" laws of nature, natural phenomena, or abstract ideas, however, historically a discovery can qualify for a patent if it involves an application of one or more of those broad concepts.

In 2012 and 2014, the Court moved the goal posts. It specified that a discovery must involve an inventive application of a law of nature, natural phenomenon, or abstract idea. That qualifier, "inventive," while perhaps of modest significance to an untrained observer, in fact represented "a sea change" in the eligibility standard, Taylor said.

For example, Taylor explained, a scientist who discovered a cure for cancer could not, under the new approach adopted by the Court, obtain a patent unless she could show that she applied her discovery in some new ("inventive") way. A practical application of the discovery—a useful application of the discovery—no longer would be enough. Taking a pill that includes the cure to cancer, for example, would not be enough because doctors have previously given pills to patients.

Not only is that standard inconsistent with hundreds of years of Supreme Court precedent; it's impossible to understand, Taylor said, since the Court failed to define clearly what exactly constitutes an "inventive application." This "misguided test," he wrote, all but ensures "incorrect results," "intense dysfunction," and "unpredictable" decisions on patents and patent applications.

For years, Taylor and other patent-law scholars critical of the Court's direction on eligibility had worried that it would drive venture capital away from emerging technologies.

"Venture capitalists expect a return on their money," he said. "How likely were they to scale back investment in research and development if they couldn't be certain that a new product, even an exciting, innovative

one, would be eligible for patent protection? Which industries were likely to be the most adversely affected?"

"These seemed like fundamental questions. So, I was surprised to discover that almost no research had been done in this area. Nobody had any data one way or the other" regarding the impact of the Supreme Court's cases on patent eligibility.

A 2017 study by the SMU professor provided the first empirical evidence that his and others' worries were well-founded. That summer, he surveyed 475 venture capitalists and private equity investors nationwide to ask if and how the Court's rulings had changed the way they invested in technology companies.

His findings, he said in his congressional testimony, "while perhaps not surprising, nonetheless confirm one of the central premises on which the patent system rests: that patents help to spur investment in development of technology."

In particular, he found, this was true in the realm of life-science industries, where patent protection is integral to the potential value of an innovative product. Overwhelming majorities of those he surveyed, for example, said eliminating patents would somewhat decrease or strongly decrease their investment in the medical devices (79 percent), biotechnology (77 percent), and pharmaceuticals (73 percent) industries.

Taylor wrote a detailed article about these and other findings for the Cardozo Law Review. Titled "Patent Eligibility and Investment," the article discusses all the results of his groundbreaking survey.

In his view, the results of his research show a stifling of investment isn't hypothetical, some possible eventuality. He thinks it's happened already.

"It is highly likely the Court's decisions have delayed or altogether prevented the development of medicines and medical procedures," he wrote on Feb. 24, 2019—not quite one year before the first coronavirus death in the United States.

Taylor's appearance before the Senate subcommittee was, in a roundabout way, the result of a March 2017 workshop he and two other professors convened at the University of California, Berkeley. The workshop brought together more than three dozen patent-law scholars, litigators, corporate counsel, and federal officials trying to make sense of the recent jurisprudence on eligibility.

While there was a consensus among participants that the Court cases were, according to the workshop's final report, "indefensible as a matter of statutory interpretation or fidelity to prior case law," there was less agreement on what to do about it. Many, but not all, favored new federal legislation to supersede the Court's actions.

When the Senate's IP subcommittee convened two years later to hear suggestions on what such a law might entail, Taylor was ready to testify, empirical data in hand.

"It was nice—having done all the research I've done on the subject—to be able to discuss it in a forum where, hopefully, it will prove helpful," he said in an interview. He praised the subcommittee's chair, Sen. Thom Tillis, R-N.C., and its ranking member, Sen. Chris Coons, D-Del., who jointly presided at the hearing. "They were very well-prepared. They asked excellent questions," Taylor said.

To date there has been no action in Congress on any proposed legislation to reform patent eligibility law. Perhaps more cutting language from Taylor will be forthcoming.

Leadership Lecture

PTAB Chief Judge Boalick focuses on improvement

Scott R. Boalick, Chief Judge for the Patent Trial and Appeal Board, shared insights on his role and the operation of the PTAB in his remarks at the Fall 2019 Leadership Lecture of the Tsai Center for Law, Science and Innovation.

Congress created the PTAB, an arm of the U.S. Patent and Trademark Office formerly known as the Board of Patent Appeals and Interferences, to decide issues of patentability when in 2011 it passed the America Invents Act. The PTAB's Trial Division conducts trials in certain contested cases involving issued patents, including inter partes, post grant, and covered business method reviews. Its Appeals Division handles appeals of rejections of patent applications by USPTO patent examiners.

Boalick said one of his most important priorities as Chief Judge is continual process improvement within the PTAB. This priority, he explained, includes enhancing the stability of the PTAB and the predictability of its rulings. All who come before the board, regardless of the outcome of their cases, should feel that they've gotten a fair shake, under procedures that are sensible and transparent, he said.

Boalick is a patent attorney with decades of experience in patent law in and out of government. Before his appointment as Chief Judge in March 2019 (a position he'd held in an acting capacity since the previous September), Boalick served as an Administrative Patent Judge, Vice Chief Judge, and Deputy Chief Judge. Before joining the USPTO in 2007, he was a patent attorney for the Department of the Navy.

Tsai Events

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Fall 2020

Tsai Talk Webinar Series: COVID-19 and the Law on the following Thursdays, 12:15–1:15 pm:

- Sept. 24
- Oct. 8
- Oct. 29
- Nov. 12

Tsai Innovation Lecture Series with Josh Malone, Inventor, Bunch O Balloons

- Tues., Sept. 15, 12:15-1:15 pm

Spring 2021

17th Annual Symposium on Emerging Intellectual Property Issues: The America Invents Act @ 10 Years

- Feb. 26, 2021