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BAKER BOTTS LECTURE

The Unfallen Sky:

Assessing the Relative Effectiveness of
Legal and Market Adaptations to Technological Change

Prof. David McGowan

Lyle L. Jones Professor of Competition and Innovation Law
Director, Center for Intellectual Property Law & Markets
University of San Diego School of Law

Commentator:
Prof. Jacqueline Lipton, University of Houston Law Center

March 7, 2013
The Coronado Club
919 Milam Street, Houston, Texas

Reception 5:30 p.m. - Lecture 6:15 p.m.
One Hour of MCLE Credit

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Thirty Years (and More) of IP in China: A Personal Reflection

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Robert Merges, University of California Berkeley School of Law
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Joel Reidenberg, Fordham University School of Law
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Patents in a Changing Economy

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F. Scott Kieff, Washington University in St. Louis School of Law
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2004
Jane Ginsburg, Columbia University School of Law
The Right to Claim Authorship

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David McGowan is Lyle L. Jones Professor of Competition and Innovation Law, and Director, Center for Intellectual Property Law & Markets, at the University of San Diego's School of Law. He holds a B.A. from the University of California, Los Angeles, and a J.D. from the University of California, Berkeley.

His research addresses topics such as antitrust policy in software markets, the implications of network effects for IP policy, legal problems associated with standard-setting organizations, open-source software development, and the elements of judgment students must acquire to develop judgment about practicing law.

Professor McGowan's best-known publications include: *Big But Brittle: Economic Perspectives of the Law Firm in the New Economy* in 2011 Colum. Bus. L. J. 1 (with Lemley); *Some Realism about the Free Speech Critique of Copyright* in 74 Fordham L. Rev.101 (2005); *Copyright Nonconsequentialism* in 69 Mo. L. Rev. 1 (2004); and *Legal Implications of Network Economic Effects* in 86 Cal. L. Rev. 479 (1998).

McGowan clerked for the Hon. A. Raymond Randolph of the U.S. Court of Appeals for the District of Columbia Circuit. He practiced in San Francisco with Skadden, Arps, Slate, Meagher & Flom and Howard, Rice, Nemerovski, Canady, Falk & Rabkin, where he was elected a director shortly before moving to academia. McGowan taught at the University of Minnesota School of Law from 1998 to 2005. He joined the USD School of Law faculty in 2005.

The Unfallen Sky

This year's lecture surveys common academic critiques of patent and copyright law and related developments (such as *eBay v. Mercexchange*, DRM, DMCA, and trespass to chattels). Professor McGowan suggests that the critiques have misfired in two ways. In patent law, concerns over "holdup" have diverted attention from the most obvious flaw in the system–that defendants who do their own work and sink their own costs are nevertheless liable for infringement. Properly defining the scope of rights to facilitate bargaining would be preferable to judicial rate-setting through damages awards.

That basic intuition–define rights properly and enforce bargains–applies outside patent law as well. Critiques of IP have erred by focusing on legal fixes to what are in fact business problems. That has led to excessive focus on mandatory and thus relatively inflexible rules rather than on sensible defaults that, combined with contract law, allow market participants the freedom and means to reach pragmatic accommodations of interests. McGowan suggests also that we should have more faith in contracts than we have had, and should realize the limits of the law when confronting technological change. These points explain why nominal successes of the prevailing critique, such as the thwarting of Article 2B and then UCITA, have not generated notable gains in relation to what courts otherwise have done.

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