IN THIS ISSUE

Intellectual Property scholarship by
Lori Andrews
Christopher Buccafusco
Edward Lee

ALSO INSIDE

César Rosado Marzán on organizing labor
with international framework agreements
The “Progress Clause”: An Empirical Analysis Based on the Constitutional Foundation of Patent Law
Lori B. Andrews

Experimental Tests of Intellectual Property Laws’ Creativity Thresholds
Christopher J. Buccafusco

Copyright-Exempt Nonprofits: A Simple Proposal to Spur Innovation
Edward Lee

Organizing with International Framework Agreements: An Exploratory Study
César F. Rosado Marzán

Bookshelf
New books by faculty
{Discovery}

THE “PROGRESS CLAUSE”
AN EMPIRICAL ANALYSIS BASED ON THE CONSTITUTIONAL FOUNDATION OF PATENT LAW

published in N.C. JOURNAL OF LAW AND TECHNOLOGY, volume 15
Lori B. Andrews
Distinguished Professor of Law

BA, Yale College
JD, Yale Law School

Lori Andrews is a distinguished professor of law at IIT Chicago-Kent and director of IIT’s Institute for Science, Law and Technology. She has been a visiting professor at Case Western Reserve University School of Law and at the Woodrow Wilson School of Public and International Affairs at Princeton University. The ABA JOURNAL describes her as “a lawyer with a literary bent who has the scientific chops to rival any CSI investigator.” She is an internationally recognized authority on emerging technologies, a mystery novelist, and the creator of a Social Network Constitution.

Professor Andrews is involved in setting policies for genetic technologies. She has been an adviser on genetic and reproductive technology to Congress, the World Health Organization, the National Institutes of Health, the Centers for Disease Control and Prevention, the federal Department of Health and Human Services, the Institute of Medicine of the National Academy of Sciences, and several foreign nations, including the emirate of Dubai and the French National Assembly. She has served as chair of the federal Working Group on the Ethical, Legal, and Social Implications of the Human Genome Project and as a consultant to the science ministers of 12 countries on the issues of embryo stem cells, gene patents, and DNA banking. She has also advised artists wanting to use genetic engineering to become creators with a capital “C” and invent new living species. Her media appearances include “Nightline” and “The Oprah Winfrey Show” and virtually every major program in between.

Recently, Professor Andrews filed an amici curiae brief in the U.S. Supreme Court on behalf of medical organizations, including the American Medical Association, in Association for Molecular Pathology, et al. v. Myriad Genetics, Inc., et al.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/landrews.
THE “PROGRESS CLAUSE”
An Empirical Analysis Based on the Constitutional Foundation of Patent Law

BY LORI B. ANDREWS

When the Founding Fathers were drafting the U.S. Constitution, they thought about how best to encourage innovation in their new nation. The result was Article I, Section 8, Clause 8 of the U.S. Constitution. This clause provides that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . .” The Progress Clause, designed to reward the creation and sharing of new knowledge, is the constitutional basis for the intellectual property system in existence today. But it also serves to limit what can be patented.

In a series of cases over the past 150 years, the U.S. Supreme Court has consistently held that one cannot patent abstract ideas, laws of nature, products of nature, or materials isolated from products of nature if those materials behave in the same way they would in nature. In 1853, when Samuel Morse convinced the Patent Office to grant him a patent on all uses of electromagnetic waves to write at a distance, the Supreme Court said that he could not patent the law of

nature that covers every such use of electromagnetic waves. He could only patent his invention—the telegraph.

In 1980, the first Supreme Court case dealing with biotechnology made clear that the exemption is just as relevant in the modern biotech age. *Diamond v. Chakrabarty*, 447 U.S. 303, involved a man-made (genetically engineered) bacterium, which the Court carefully described as *not naturally occurring*. In that case, the Court stated:

> The laws of nature, physical phenomena, and abstract ideas have been held not patentable. Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are “manifestations of . . . nature, free to all men and reserved exclusively to none.”

The *Chakrabarty* Court held that an invention from a product of nature is only patentable if it is “markedly different” from nature. The reason it is important not to have patents on products of nature or laws of nature is that, in the words of Justice Breyer in 2006, it would give inventors “too much patent protection” and “impede rather than ‘promote . . . ’ the constitutional objective of patent and copyright protection.”

The premise behind the prohibition of patents on products of nature is that such patents will impede innovation in violation of the Progress Clause. But is that premise correct? A 2013 case, *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013), in which the Supreme Court invalidated patents on human genes, provides the perfect setting in which to analyze whether patents on products of nature lead to progress or impede it. Over 100 amicus briefs and over 90 affidavits (including one from a Nobel Laureate in economics) were filed in the case. These materials analyzed every study that was ever done about gene patents.

The question of whether gene patents spur or impede innovation can be broken into two parts. First, are gene patents necessary to spur initial innovation—the location and identification of the gene sequence? Second, do gene sequence patents spur or impede subsequent innovation—the study of the prevalence of the related disorder, the development of diagnostic testing, and the development of treatments?

Studies suggest that patents are not necessary to ensure the discovery of genetic sequences. Scientists were searching for and finding genes long before patents were available. They try to discover genes for many reasons—to help mankind, win Nobel Prizes, attain academic achievement, and create professional status. Most geneticists are willing to undertake research to discover genes without patenting them. In fact, in a study of 1,229 American Society of Human Genetics members, 61% of those in industry, 78% of those in government, and 77% of academic scientists stated that they disapproved of patenting DNA.

The patent incentive can actually impede the discovery of human genes. When Jonathan Shestack’s son was diagnosed with autism in 1992, experts estimated that researchers would need DNA samples from at least 100 families with two or more autistic members in order to pinpoint a gene associated with autism. Shestack contacted the four groups of university scientists who were searching for autism genes and offered them funding. He discovered that no group had enough DNA samples to determine which genes are autism-related, but
there were more than enough if the groups pooled their samples. Shestack asked the four groups to share their DNA samples with each other so that they all had a better shot at identifying autism-related genes. Every researcher with whom he spoke refused to share samples. Each wanted to be the one to find the autism gene and patent it. Rather than speeding up the discovery of a gene sequence related to autism, the possibility of obtaining a patent on the gene slowed it down.

“Studies suggest that patents are not necessary to ensure the discovery of genetic sequences. Scientists were searching for and finding genes long before patents were available. . . . The patent incentive can actually impede the discovery of human genes.”

Moreover, once genes are patented, they impede further innovation at both the individual laboratory level and at a system-wide level. These impediments occur in at least four ways: (1) discouraging scientific researchers’ undertaking of genetic research; (2) discouraging scientific researchers’ public disclosure of data; (3) discouraging scientific researchers’ cooperation with each other; and (4) discouraging people from participating in genetic research.

A substantial number of geneticists report that gene patents detrimentally impact subsequent discoveries. Forty-nine percent of American Society of Human Genetics members reported being forced to limit their research in some way due to the existence of various gene patents.

Gene patents have a negative impact on follow-up research and the production of public genetic knowledge. There is a 5% to 17% reduction in the rate of scientific citations after the issuance of a patent. The study authors interpret the decline in citations “as a net loss to long-run public knowledge production.”

Patents on human genes impede the development, deployment, and improvement of genetic tests. A study that surveyed genetics lab directors revealed that at least 25% of labs had abandoned one or more genetic tests that they themselves had developed, due to notification from the patent holder or licensee. In addition, 53% of genetics labs had stopped developing new clinical genetic tests due to concerns about gene patents and licensing patent rights.

Gene patents can hinder innovation in a less direct manner as well. Potential research subjects are less likely to participate in research if they are aware that their genes will be patented—32% of those surveyed said they would be offended if research conducted with their own tissue was used for patenting of products.

The increase in secrecy in the university laboratories (prompted by the desire to patent findings) is also damaging the training of new scientists. A survey of doctoral students and postdoctoral fellows in the life sciences revealed profound effects of data withholding on the next generation of scientists. Of the trainees surveyed, 49% said withholding of information had a negative effect on progress in their laboratory and 33% felt it interfered with their education.

What if each generation of scientists was forbidden to use—or even think about—the theorems, principles, and
natural phenomena that had been discovered or proven by the previous generation of scientists? In order to assure that does not happen, a patentability analysis under the Progress Clause requires courts to assess whether the purported invention is actually an unpatentable product of nature, law of nature, or abstract ideas and (in the words of the Supreme Court) to weigh “how much future innovation is foreclosed relative to the contribution of the inventor.” Analyses of the impact of gene patents demonstrate how patents on products of nature can impede initial and subsequent innovation. Consequently, the underlying goals of the Progress Clause are served by the Myriad decision which invalidated gene patents.

LORI B. ANDREWS
SELECTED PUBLICATIONS

Books


Articles and Contributions to Books


Where’s Waldo?: Geolocation, Mobile Apps, and Privacy, 9 SciTech Lawyer 6 (summer 2013).


EXPERIMENTAL TESTS OF INTELLECTUAL PROPERTY LAWS’ CREATIVITY THRESHOLDS

published in Texas Law Review, volume 92
Christopher J. Buccafusco
Associate Professor of Law

BS, Georgia Institute of Technology
JD, University of Georgia Law School
PhD, University of Chicago (in progress)

Christopher Buccafusco joined the IIT Chicago-Kent faculty in 2009 and was voted Professor of the Year by the Student Bar Association for 2009–10. He teaches Torts, Copyright, and a course on Law and Food. His research interests include intellectual property law, behavioral law and economics, law and psychology, and legal history. His recent work focuses on valuing creativity and innovation and on the application of happiness research to the law. His research has been supported by grants from Google, the Olin Foundation, and the Batten Foundation. His published articles have appeared in the Columbia Law Review, University of Chicago Law Review (twice), California Law Review, Cornell Law Review (twice), and Georgetown Law Journal.

Before coming to Chicago-Kent, Professor Buccafusco taught for a year as a visiting faculty member at the University of Illinois College of Law. He is the co-director of the recently-established Center for Empirical Studies of Intellectual Property at Chicago-Kent.

For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/cbuccafusco.
In the United States, intellectual property (IP) law is intended to encourage the production of new creative works and inventions. Copyright and patent laws do this by providing authors and inventors with a bundle of exclusive rights relating to the use and development of their creations. Importantly, however, these fields differ greatly in the ways that they determine whether some new creation is sufficiently innovative to merit legal protection. Copyright law sets the creativity bar for new works of authorship especially low, whereas patent law demands that a putative inventor prove that her creation is highly innovative.

Although this difference has been noted repeatedly in the past and explained as a matter of various differences between copyrightable and patentable subject matter, relatively little research has focused on whether the different IP thresholds affect the incentives and behavior of creators. This is an important question, because it should influence the current debate about where creativity thresholds in IP law should be set. Some scholars have suggested that copyright should apply a higher threshold to encourage better creativity, while

others have suggested that IP laws’ incentive structures may be doing more harm than good.

Legal scholarship on the effects of differing IP thresholds on creators has generally relied on standard economic assumptions about the way that people respond to incentives. Creators are assumed to be rational and to respond to increased incentives by producing more and better creations. According to this reasoning, because patent law requires more creativity as a pre-condition to the conferral of IP rights compared to what copyright law requires, creators subject to the patent regime will be encouraged to be more creative than those subject to the copyright regime.

Recent research in the social sciences, however, suggests that the connection between incentives and behavior—particularly with regard to creativity—is not always so straightforward. Although there is research that indicates that providing incentives to act creatively has the expected effect of increasing creativity, other research suggests that the kinds of incentives that are offered and the manner of their provision can undermine creative behavior. For example, monetary incentives to perform creative tasks may dampen creativity. In such cases, the monetary incentive may create an extrinsic motivation for the behavior that can “crowd out” the intrinsic motivation to be creative. Moreover, importantly for our purposes, increasing the magnitude of an incentive to be creative may not always lead to more or better behavior. Once creativity incentives reach a certain salience or intensity, there is a risk that people will be overly focused on achieving the incentive and “choke.”

Of course, the kinds of creativity that IP law deals with are highly varied. The innovative leap associated with designing a graphical user interface or with developing a new drug may be quite different from creativity involved in painting or poetry. There may also be differences in creativity within the separate IP regimes: although both painting and poetry are within the domain of copyright law, thinking creatively about line, shape, and color could be very different from thinking creatively about diction, meter, and rhyme. Because the cognition associated with these efforts may be very different, one might think that the effects of thresholds on creativity could be different as well.

In a series of experiments reported in this Article, we extend the research on the effects of incentives for creativity into the realm of intellectual property. Specifically, we test whether the existence of a creativity threshold that conditions entry into a prize lottery on meeting certain performance standards affects how creative people are. The experiments reported here involve various creativity tasks in which subjects are randomly assigned to conditions that are intended to model the different creativity thresholds employed by copyright and patent law. Doing so allows us to test whether the existence and nature of a threshold increases, decreases, or does not affect subjects’ creativity.

The subjects for all of our experiments were recruited from Amazon Mechanical Turk. They were paid $0.50 for participating, and they were told that they would have a chance to earn a $500 prize if they won a creativity game. Subjects were randomly assigned to one of five conditions:

- **No Incentive**—Game score didn’t matter. Each subject would be assigned a lottery ticket for the prize.
- **Copyright**—Game score mattered, and the better they did in the game the more lottery tickets they would get.
- **Patent High**—Game score mattered, but only the subjects scoring in the top
5% would receive lottery tickets based on their scores. Subjects whose scores were below the top 5% would not receive lottery tickets.

Patent Mid—Same as Patent High except the threshold was set at the top 25%.

Patent Low—Same as Patent High except the threshold was set at the top 50%.

The first experiment involved computational creativity similar to the kinds of problems that face computer scientists, engineers, and biologists. Subjects were asked to solve a “knapsack problem” in which they had to maximize the value of the goods in a knapsack without exceeding its weight limit. Because they were only given a limited time to solve the problem, they were not able to calculate the optimal answer but instead had to use heuristics.

Subjects in the Patent conditions provided significantly better solutions than did those in the Copyright and No Incentive conditions. (See Figure 1.) When encouraged to score better in order to win the prize, people tended to improve their performance. Importantly, however, subjects in the Copyright condition, where better performance was rewarded, did not provide more answers than subjects in the No Incentive condition, where performance was unrelated to reward.

The second experiment involved verbal creativity. Subjects were asked to provide as many creative uses of the word “key” as they could in 90 seconds. Creative uses included “John Maynard Keyes” or “monkey.” Again, subjects were randomly assigned to one of the five threshold conditions, and again those in the Patent conditions tended to outperform those in the Copyright and No Incentive conditions. Our results were not as strong here as they were in the first experiment, but the overall pattern is similar. For example, subjects in the No Incentive conditions produced 5.12 creative answers, those in the Copyright condition produced 5.32 creativity answers, while those in the Patent Mid condition produced 6.51 creative answers.

A third experiment involving visual creativity, however, failed to detect any
significant differences between the threshold conditions. Similarly, in a task that did not involve creativity (adding sets of numbers) there were no significant differences between the conditions.

“Our results provide some support for the use of higher thresholds in IP law, and they do not support the view that higher thresholds will inhibit performance.”

This research suggests two important lessons about the effects of thresholds on creativity incentives. First, the incentive provided by the Copyright condition never produced more or better creativity than No Incentive condition. Our subjects seemed to be willing to engage in creative activities even when no external monetary motivation was at stake.

Second, subjects tended to perform more creatively when there was some threshold for receiving the reward. And in no case did the Patent conditions ever produce worse creativity than the Copyright or No Incentive conditions. Accordingly, our results provide some support for the use of higher thresholds in IP law, and they do not support the view that higher thresholds will inhibit performance.

This research should help illuminate the debate about the role of creativity thresholds in IP law. Of course, this is just the beginning of empirical investigation in this area. Our studies differ from many areas of creativity that IP law addresses. Our subjects were amateurs not professionals, our tasks were short term rather than long term, and our subjects worked individually rather than in groups. All of these differences could produce alternative results, and we are excited about the prospect of doing that research. Ultimately, however, these problems require data and research and not merely speculation and assumption.

CHRISTOPHER J. BUCCAFUSCO
SELECTED PUBLICATIONS

Books


Articles


COPYRIGHT-EXEMPT NONPROFITS
A SIMPLE PROPOSAL TO SPUR INNOVATION

published in Arizona State Law Journal, volume 45
Edward Lee
Professor of Law

BA, Williams College
JD, Harvard Law School

Edward Lee is a Professor of Law and the Director of the Program in Intellectual Property Law at IIT Chicago-Kent. He is the founder and managing director of The Free Internet Project, a nonprofit whose mission is to provide the public with information about the latest legal and technological efforts to protect Internet freedoms around the world. Previously, he was a fellow at the Stanford Center for Internet Society and a professor of law at The Ohio State University Moritz College of Law. He is a cum laude graduate of Harvard Law School, where he was an editor and co-chair of the books and commentaries office of the Harvard Law Review. He graduated Phi Beta Kappa and summa cum laude from Williams College.

Professor Lee’s research focuses on the ways in which the Internet, technological development, and globalization challenge existing legal paradigms. His book The Fight for the Future chronicles the grassroots protests in the United States and European Union to stop two controversial copyright proposals that people feared would lead to greater policing and censorship of the Internet. His current research conceptualizes the popular efforts around the world to protect Internet freedom as a new form of popular constitutionalism. In addition to numerous articles, he co-authored a leading casebook with Daniel Chow titled International Intellectual Property: Problems, Cases, and Materials (West Group 2d ed. 2012).

From 1996 to 1999, Professor Lee was a litigation associate in the Washington, D.C., office of Mayer, Brown & Platt, working at all levels of trial and appellate litigation, including cases before the U.S. Supreme Court. Immediately following law school, he clerked for the Honorable John T. Noonan Jr. of the U.S. Court of Appeals for the Ninth Circuit.

For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/elee.
PINTEREST IS THE FASTEST growing website ever, sparking a new fascination among millions of people. The social network allows people to save Internet content and “pin” it to their own “pinboards.” In 2013, Pinterest closed two more rounds of funding of $200- and $225 million, respectively, with its valuation more than doubling to $3.8 billion. Everyone seems to love using Pinterest, from ordinary Internet users to businesses, celebrities, and even the President.

Pinterest faces one problem: its activity may not be entirely legal. The “pin it” technology of Pinterest enables its users to copy vast amounts of copyrighted content—mainly photographs, but potentially any content—directly from websites and without permission of the copyright owners. The copied photographs and content are then displayed on Pinterest user pages and easily copied and shared with other user boards through a seamless “repin it” feature. Although Pinterest’s pin/repin functionality may arguably fall within the safe harbor of the Digital Millennium Copyright Act (DMCA), the argument is debatable, if not doubtful, and

has not been tested in court.

The Pinterest example is emblematic of a larger problem. The Copyright Act of 1976, which originated with the analog technologies of the 1970s in mind, is outdated and out-of-sync with the advances of the Internet and digital technologies. Because the 1976 Act was made for a different era, disruptive new Internet platforms—such as Google Book Search and YouTube—now commonly face protracted copyright litigation that may take years to resolve.

This Article explains how U.S. copyright law currently harms innovation in Internet platforms and offers a solution for Congress to enact a copyright exemption that specifically fosters innovation in Internet platforms, while protecting the interests of authors. The proposal is not a panacea for the problem, much less a comprehensive revision of the Copyright Act. Instead, the proposal is one model for how the copyright system can establish a more coherent innovation policy for today’s Internet age.

In his pathbreaking 1997 work *The Innovator’s Dilemma*, Clayton Christensen identified a paradoxical dilemma facing businesses that seek to innovate: the more established and successful the company, the less able to innovate it is. The past successes of a company effectively color—and limit—the investment decisions and expectations on return. As a result, established companies may have a much more difficult time than startups—which are unencumbered by past successes and views—in developing and creating successful new disruptive technologies. Under Christensen’s innovator’s dilemma, the legacy of a business’s success may be a loss in its ability to innovate.

Borrowing Christensen’s helpful terminology, this Article posits that U.S. copyright law functions much like an established business or firm. The 1976 Act represents a set of value decisions made for technologies and modes of content distribution and exploitation that are becoming increasingly obsolete. However successful the 1976 Act may have been in spurring, or at least not impeding, the development of analog technologies, that success no longer holds true with digital technologies. The paradox is that, of all the areas of law, copyright law most directly bears on what new Internet platforms can be developed legally, yet copyright law is the least developed to spur innovation in new platforms today.

Simply stated, the copyright innovator’s dilemma is the following: the more innovative or different a new speech technology is in terms of utilizing content, the more likely the technology will face a copyright lawsuit or challenge. Under this copyright innovator’s dilemma, technological innovation in speech technologies will not occur unless developers assume the risk of substantial—and potentially crushing—copyright liability.

The major problem that any new Internet platform or speech technology faces is the specter of a massive copyright lawsuit. A new platform that no one uses is unlikely to draw litigation. But as a new

“This Article outlines a proposal for how Congress can update the Copyright Act to spur greater innovation in Internet platforms, while protecting the interests of authors.”
platform gains popularity—meaning it has provided social value to a greater number of users—it is sure to draw scrutiny from copyright owners. Any new or disruptive platform will likely have to prove its qualification for the DMCA safe harbor or fair use exception, especially if the platform has been successful in generating users.

What compounds the problem is the rise of class-action copyright lawsuits, which raise the amount of possible statutory damages at stake to astronomical and potentially business-ending amounts. The lengths of the two massive class-action lawsuits against Google Book Search and YouTube provide a sobering warning to new Internet platforms. The lawsuits were still ongoing in 2013, even after eight and six years, respectively, since they were filed. The litigation could easily require more than a dozen years to reach final decisions if the Supreme Court eventually reviews the cases. The protracted litigation could well stunt the development and growth of the technology, as appears to be the case with Google Book Search.

This Article outlines a proposal for how Congress can update the Copyright Act to spur greater innovation in Internet platforms, while protecting the interests of authors. The proposal is presented in a bill titled the Nonprofit Internet Copyright Exemption (NICE) Act. The basic idea is that the Copyright Act should create more breathing room for developers to create new Internet platforms with greater assurance that the new uses of copyrighted works are permitted—a goal consistent with the Supreme Court’s admonition in *Grokster* and *Sony*. To that end, this Article proposes a flat, categorical copyright exemption for qualifying nonprofit institutions to develop Internet platforms that enable their users to create user-generated content, including through Internet curation. Under this proposal, a nonprofit can qualify for “copyright-exempt” status similar to how it can qualify as tax-exempt under 501(c)(3) of the Tax Code.

The overriding goal of the NICE Act is to spur greater innovation in Internet platforms that are socially beneficial by removing the threat of protracted and potentially business-ending litigation over copyright claims and defenses. In order for the exemption to be effective, it must minimize the threat of copyright lawsuits being filed against a new technological use of content, while at the same time discouraging copyright infringement.

In that vein, the proposal offers a categorical exemption for a broad class of technological uses of content that can provide breathing room for developers to innovate. The proposal is meant to remedy the deficiencies of the DMCA safe harbors, whose protection of only four functions for ISPs is too narrow and outdated, while also remedying the deficiencies of the fair use doctrine in being too vague. The proposal therefore seeks to define an exemption or safe harbor that is somewhere in between the DMCA and fair use in approach. In other words, the proposal seeks to exempt a broader class of functionalities than the DMCA under a rubric that can accommodate future innovations, but in a way that will not require case-by-case adjudication like the fair use doctrine. By exempting a broad, open-ended class of functionalities, but limiting them to a specific purpose, the NICE Act corrects the fundamental defect of the DMCA safe harbor.

The basic exemption under the NICE Act, which adds another exemption to the Copyright Act, shall read:

Section 123. Limitations on exclusive rights: nonprofit Internet platforms for user-generated content.
(a) Notwithstanding the provisions of section 106, it is not an infringement for an entity that qualifies as a tax-exempt entity under Section 501(c)(3) of the Internal Revenue Code to develop and offer an Internet platform that enables the public to utilize copyrighted works that are lawfully accessible free of charge on the Internet, for the public’s creation of user-generated content in the Internet platform, provided—

(1) the Internet platform is offered free of charge to the public;

(2) the Internet platform offers copyright owners a reasonable opportunity to opt out of the platform so that their works on the Internet are not utilized in the platform; and

(3) the Internet platform provides a hyperlink to the webpage of the original source of a utilized copyrighted work.

(b) It is not an infringement for users of Internet platforms that fall within the exemption in subsection (a) to utilize copyrighted works that are lawfully accessible free of charge on the Internet in noncommercial user-generated content that the users prepare.

At the same time, the proposal seeks to balance the interests of authors and copyright holders. For example, as explained below, copyright holders can opt out of the copyright exemption by electing to remove their works from the Internet platforms that fall within the exemption. In addition, copyright holders whose works are utilized in such platforms can potentially receive compensation for use of their works under the exemption by the establishment of an Authors’ Fund. To borrow Justice Souter’s words in Metro-Goldwyn-Mayer v. Grokster, the goal is to create “a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement” (545 U.S. 913, 928 (2005)).

EDWARD LEE
SELECTED PUBLICATIONS

Books


Articles

The Free Internet Movement as Popular Constitutionalism (work in progress).


ORGANIZING WITH INTERNATIONAL FRAMEWORK AGREEMENTS
AN EXPLORATORY STUDY

forthcoming in UC Irvine Law Review

Professor Rosado Marzán’s current research interests are at the intersection of labor rights and social science research. He spends significant time in the field observing and interviewing people who “make law” every day. For example, in two different projects he interviewed labor lawyers, union officers, and management attorneys in Puerto Rico, Europe, and the United States to understand how they use law and “law-like” norms to build or challenge labor unions. In another project he observed labor inspectors and labor judges in Chile interact with employers and employees to understand how employment law is enforced in that country.

Professor Rosado Marzán advises the Chicago-Kent Institute for Law and the Workplace and the Masters in Work Law at the Adolfo Ibáñez University Law School in Chile. He is a member of the Regulating Labour and Markets Programme (“ReMarkLab”) at Stockholm University, a project funded by the Swedish Council for Working Life and Social Research. He is also a Research Scholar of the Center for Labor and Employment Law at New York University School of Law. He has been an active member of the American Sociological Association, the Law & Society Association, and other professional associations.

For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/crosado.
In the late 1940s and early 1950s, one in three American male workers was a member of a labor union. Today that number is about one in ten, and much less than that in the private sector (less than 7%). (See Figure 1.) The problem of declining union membership is significant because organized labor and the rise of the American middle class have been inexorably linked. The National Labor Relations Act of 1935 (NLRA) helped to swell the ranks of organized labor and create a middle class in the United States—a middle class that was “the envy of the world.” Unionization increased wages through collective bargaining and helped to provide health care and pensions to working families. Through legislative advocacy, unions also helped to implement minimum wage legislation and other workplace standards that covered all workers, be they union members or not. In many instances, nonunion employers also copied the wages and terms and conditions of employment of their employees on what used to be considered model union contracts, such as those of General Motors, furthering the expansion of the American middle class. But those days are now over, and the American
middle class seems to be shrinking into extinction. Union contracts are anything but “models” for many employers. Sometimes nonunion workers even resent union workers, because union workers receive perks unavailable to almost everyone else in the working class.

Legal scholars and social scientists have attributed the decline of unions to weak labor laws that permit employer opposition of unions in the workplace, international competition created by globalization, and a peculiar anti-union political culture that permeates the United States.

But while union density falls and inequality creeps upward in the United States, we have experienced the counterintuitive rise of international framework agreements (IFAs), or agreements signed by global union federations and multinational corporations. (See Figure 2.) These agreements include guarantees that the signing employers and unions will abide by the core labor standards of the International Labor Organization, one of the oldest U.N. agencies. These core labor standards are: freedom of association and effective collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation. The first core labor standard, pertaining to freedom of association, includes the fundamental principle of non-interference with employees’ rights of

---

Figure 1.

Union Density in the USA, Private, Public, and Combined Sectors, 1973–2011*


*Excludes 1982 because of missing data.
Organizing with International Framework Agreements

Number of New IFAs Signed by Year, 1994–2012 (N = 110)

![Graph showing the number of new IFAs signed by year from 1994 to 2012. The graph indicates a steady increase until a peak in 2008, followed by a decline.]


association. In other words, IFAs contain employer pledges not to oppose workers who want to organize. If employer opposition against labor unions has been blamed for union decline, and employers who have signed IFAs have in effect pledged not to interfere with unions, can an IFA facilitate unionization in the United States?

To start to answer this question, I performed a research project in the U.S. and Europe—sponsored by Stockholm University and its Regulating Markets and Labor Program—in which I interviewed unions and multinational firms in the private security and auto industries that signed IFAs. I reported on four firms, representing two industries: the private security firms Securitas and Group 4 Securicor (G4S) and the automakers Daimler and Volkswagen. All of these firms have signed IFAs and have significant U.S. operations.

I found out that IFAs, on their own, are not sufficient to organize workers in the United States, even when the signatory employers respect the terms of the agreement. Several obstacles to union organizing other than employer opposition seem to prevent workers from organizing. One of these obstacles seems to be economic—the easy replacement of union with nonunion workers facilitated by subcontracting, which is the norm in the private security industry. At Volkswagen, entry-level workers earn more than in the “Big 3” American automakers covered by union contracts, making unionization at Volkswagen an uphill battle. Another obstacle seems to be anti-union
politics, which strongly affects auto plants in some southern states.

But while my case studies clearly show that the IFAs are not sufficient to organize workers, unions might use IFAs in a way that, although different from the exclusive representation model that American unions favor, could still effectively represent some workers: the “minority union.” Minority unions are unions that represent only their members. As I explain more fully in my Article, U.S. employers do not have the legal duty to bargain with minority unions. However, under the international norms inscribed in the IFAs, employers should recognize minority unions. In fact, Volkswagen recently seems to have recognized a minority union of the United Auto Workers (UAW) in Chattanooga, Tennessee, where the German firm builds the Passat model.

Given that most IFAs are likely not legally binding instruments, unions need to enforce them with the help of labor organizations and works councils in the home countries of the signatory firms. These foreign labor entities have preexisting bargaining relationships with the signatory corporations that are based in Europe and elsewhere. The foreign labor groups have ways of putting pressure on the foreign corporations that are unavailable to American unions, such as through work council representation, supervisory board representation, the use of the media in the corporations’ home countries, or simply through informal and direct, one-to-one conversations between union and management leaders. In fact, worker organizations in the home countries of the signatory firms are constitutive of global unions and in some

“IFAs could become more effective tools to build some unions in the U.S., but they have to be used in creative, nontraditional ways.”

I also argue that these IFA-supported minority unions would have more robust strike rights to build solidarity. The employer, if it lives by the IFA, should not permanently replace any economic striker. While employers can permanently replace economic strikers under U.S. labor law, it is proscribed under international standards.

Finally, such minority unions should also have the right to engage in secondary strikes and boycotts. Even though secondary activity is for the most part banned by U.S. labor law, international standards protect them in most instances. Employers who sign IFAs should not pursue injunctive or damage claims against unions that engage in secondary strikes and boycotts.

instances are the real parties behind the IFAs. In this manner, the IFA could provide a new organizational tool to American workers: a minority union “on steroids,” backed by global solidarity.

IFAs provide the opportunity for unions to better collaborate with the signatory employers both at the level of the shop and outside. The collaborative relationship between Volkswagen and the UAW in Chattanooga attests to this real possibility for “grown up” industrial relationships in the twenty-first century.

In all, I conclude that IFAs could become more effective tools to build some unions in the United States, but they have to be used in creative ways that build associational power outside the confines of
the traditional American exclusive representation union model. It is time to truly internationalize labor unions, both in their relations with the international labor movement and in the way they relate to employees and employers in the United States. If, indeed, “another world is possible,” it has to begin at home—by challenging our existing ways of doing things and by living up to the exigencies our new, globalized century.

CÉSAR F. ROSADO MARZÁN
SELECTED PUBLICATIONS

Books


Articles


Works in Progress

Land dispossession occurring in South Africa during colonialism and apartheid is a quintessential example of “dignity takings,” which involves the deprivation of property and also dignity. The nation has attempted to move beyond the more common step of providing reparations (compensation for physical losses) and to instead facilitate “dignity restoration,” which is a comprehensive remedy that seeks to restore property while also confronting the underlying dehumanization, infantilization, and political exclusion that enabled the injustice. Professor Atuahene interviews over one hundred and fifty South Africans who participated in the nation’s land restitution program and provides a snapshot of South Africa’s successes and failures in achieving dignity restoration.

Howard Eglit
Professor of Law

Age, Old Age, Language, Law: A Dysfunctional—Often Harmful—Mix and How to Fix It
(Self-published, spring 2014)

Using a synthesis of sociological, linguistic, and legal sources, this book addresses the uses and misuses of language both to create and to perpetuate ageism—or negative biases regarding the elderly. The primary focus is on depictions and reports in the print news media, with attention also given to age bias in movies, television, and literature. Legal analysis is presented in an effort to determine whether there are law-based means to combat the rampant age discrimination that these vehicles of communication both create and nurture. Non-legal initiatives for combating ageism also are addressed. Professor Eglit is one of the best-known experts on law and aging in the U.S. He has litigated, spoken, and written extensively on these issues.

César F. Rosado Marzán
Assistant Professor of Law

(Thomson Reuters-Chile, forthcoming fall 2014)

Scholars have noted that judicial conservatism has eroded labor and employment law (i.e. “work law”) in the U.S. and elsewhere. The Roberts Court has kept in line with such conservatism, deciding a number of key work law cases in favor of employers. But work law has experienced a rebirth in South America after years of authoritarian rule and dictatorship. There may be lessons that can be drawn from the South American experience for the U.S. and other jurisdictions where work law has suffered setbacks.
A forum that brings together all the rich intellectual contributions of the IIT Chicago-Kent faculty and that encourages respectful and scholarly dialogue within the extended IIT Chicago-Kent community. Posts cover the latest faculty news and a wide range of legal topics, from in-depth analyses of U.S. Supreme Court rulings to insights on law and culture.