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Diamond Anniversary: 75 Years of the Lanham Act

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CARDOZO SCHOOL OF LAW'S
ARTS & ENTERTAINMENT LAW JOURNAL PRESENTS
THE SPRING 2021 SYMPOSIUM

Diamond Anniversary

**75 YEARS
OF
THE LANHAM ACT**

**MARCH 24, 2021
CARDOZOAEIJ.COM**

CARDOZOAEIJ
Arts & Entertainment Law Journal

CARDOZO LAW
FAME
FASHION, ARTS, MEDIA &
ENTERTAINMENT LAW CENTER

INTELLECTUAL PROPERTY
BS
LAW SOCIETY

Schedule

Welcoming Remarks, 2pm

Michael Burstein, Vice Dean, Cardozo School of Law

Keynote Address, 2:15pm

Jessica Litman, John F. Nickoll Professor of Law, University of Michigan Law School

[15 minute break]

Panel 1: The Scope & Strength of Trademark Law, 3:15pm

This panel will explore the origins of the Lanham Act and its role in expanding both the scope and enforcement of trademark law.

Mark McKenna, John P. Murphy Foundation Professor of Law, Notre Dame University Law School

Leah Chan Grinvald, Associate Dean for Academic Affairs & Professor of Law, Suffolk University Law School

Theodore H. Davis, Partner, Kilpatrick Townsend & Stockton LLP

Megan K. Bannigan, Partner, Debevoise & Plimpton LLP

Felix Wu, Professor of Law, Cardozo School of Law (Moderator)

[15 minute break]

Panel 2: Distinctiveness in the Age of the Internet, 4:45pm

This panel will explore changing ideas about the types of evidence used to show the distinctiveness of a mark, both usage evidence and evidence from surveys.

Alexandra J. Roberts, University of New Hampshire Franklin Pierce School of Law

Laura Heymann, Chancellor Professor of Law, William & Mary Law School

Barton Beebe, John M. Desmarais Professor of Intellectual Property Law, New York University School of Law

David H. Bernstein, Partner, Debevoise & Plimpton LLP

Felix Wu, Professor of Law, Cardozo School of Law (Moderator)

Reception & Networking, 6:00pm

Speaker Biographies

Michael Burstein, Vice Dean and Professor of Law, Cardozo School of Law

Michael J. Burstein is a Vice Dean and Professor of Law at Cardozo Law, where he teaches and writes about intellectual property, innovation policy, and law and entrepreneurship. Professor Burstein's research focuses on the ways in which intellectual property law, corporate law and public law facilitate relationships among entrepreneurs, markets, and government actors and influence the production and dissemination of innovative works and ideas. His recent publications include articles about patent markets, innovation prizes, judicial challenges to patent validity, and non-IP strategies for information exchange. He is currently writing about the legal treatment of information as an asset and editing a volume of case studies that explore sharing and commons-based production in entrepreneurial communities. Before joining the Cardozo faculty, Professor Burstein was a Climenko Fellow at Harvard Law School. He was previously an appellate litigator in private practice in Washington, DC, a Bristow Fellow in the Office of the Solicitor General, U.S. Department of Justice, and a law clerk for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. He was also a management consultant at McKinsey & Co. Professor Burstein holds a J.D., *magna cum laude*, from the New York University School of Law and a B.A. in Molecular Biophysics & Biochemistry and Ethics, Politics & Economics from Yale University.

Jessica Litman, John F. Nickoll Professor of Law, University of Michigan Law School

Jessica Litman, the John F. Nickoll Professor of Law, is the author of *Digital Copyright* and the coauthor, with Jane Ginsburg and Mary Lou Kevlin, of the casebook *Trademarks and Unfair Competition Law: Cases and Materials*. Before rejoining the Michigan faculty in 2006, Professor Litman was a professor of law at Wayne State University in Detroit, a visiting professor at New York University School of Law and at American University Washington College of Law, as well as a professor at Michigan Law from 1984 to 1990. In addition, she has taught copyright law at the University of Tokyo as part of the Law Faculty Exchange Program. Professor Litman is a past trustee of the Copyright Society of the USA, a past chair of the Association of American Law Schools Section on Intellectual Property, and a past member of the Future of Music Coalition's advisory council and the advisory board for Public Knowledge. She is an adviser for the American Law Institute's *Restatement of Copyright*, a director of the American Trademark Law Society, and a member of the advisory board of *Cyberspace Law Abstracts*. She graduated from Reed College, earned an MFA at Southern Methodist University, and holds a JD from Columbia Law School.

Mark McKenna, John P. Murphy Foundation Professor of Law, Notre Dame University Law School

Professor Mark P. McKenna teaches and writes in the areas of intellectual property and privacy law. He is widely recognized as a leading intellectual property scholar, having published in many of the most prestigious journals in his field. Though his core area of expertise is trademark law, he has written broadly on nearly every area of intellectual property, including utility patent, design patent, copyright, and the right of publicity. His most recent work has focused on the intersection of intellectual property rights regimes and the intersection of IP rights with adjacent rights.

McKenna joined the Notre Dame Law School faculty on a permanent basis in the Fall of 2008 after visiting for a semester in the Spring of 2008. He has also been a visiting professor at Stanford Law School, the University of Toronto Faculty of Law, the Munich Intellectual Property Law Center, and the Turin University-WIPO Master of Laws in Intellectual Property Program.

Prior to joining the Notre Dame faculty, McKenna was a member of the faculty at Saint Louis University School of Law and practiced law with an intellectual property firm in Chicago, where he primarily litigated trademark and copyright cases. He graduated from the University of Notre Dame in 1997 with a degree in Economics and earned his J.D. from the University of Virginia School of Law in 2000.

In addition to various intellectual property courses, McKenna teaches Information Privacy Law and the first-year Torts class, and has previously taught Civil Procedure. He is the faculty director of Notre Dame Law School's Program on Intellectual Property & Technology Law.

Leah Chan Grinvald, Associate Dean for Academic Affairs & Professor of Law, Suffolk University School of Law

Professor Grinvald received her B.A. in East Asian Studies, summa cum laude, from The George Washington University. She later obtained a J.D. from the New York University School of Law, where she served as the Articles and Notes Editor for the Journal of International Law & Politics.

Following law school, Professor Grinvald served as a law clerk for the Honorable Frank Sullivan, Jr. in the Indiana State Supreme Court. Before joining the faculty at Suffolk Law, Professor Grinvald was an assistant professor of law at Saint Louis University School of Law. Professor Grinvald teaches courses in Trademarks, Copyright, and International Intellectual Property. Her research focuses on domestic and international enforcement of intellectual property laws.

Prior to entering academia, Professor Grinvald served as global corporate counsel at Taylor Made Golf Company, Inc. She advised on a variety of legal issues including trademark, copyright, contract and employment law arising within TaylorMade and its affiliated entities located outside of the United States. Before TaylorMade, Professor Grinvald was a corporate associate with Latham & Watkins LLP and Clifford Chance US LLP.

Theodore H. Davis, Partner, Kilpatrick Townsend & Stockton LLP

Ted Davis is a partner in the Atlanta office of Kilpatrick Townsend & Stockton LLP, where he has practiced trademark, copyright, false advertising, and unfair competition law since 1990. Outside the office, he has taught as an adjunct professor at the Emory University and the University of Georgia schools of law and has testified before Congress on trade dress and Internet issues. He is a past member of the International Trademark Association's Board of Directors, a past chair of the American Bar Association Section of Intellectual Property Law, and a past chair of the American Intellectual Property Law Association's Trademark Law Committee. As a frequent amicus advocate, he has represented INTA, the ABA, and the AIPLA in a number of briefs submitted to the U.S. Supreme Court.

Ted received his undergraduate degree from Davidson College and his law degree from the University of Virginia. He is a member of the Georgia, New York, and District of Columbia bars.

Megan K. Bannigan, Partner, Debevoise & Plimpton LLP

Megan K. Bannigan is a litigation partner and member of the Litigation and Intellectual Property & Media Groups, focusing on trademarks, trade dress, copyrights, false advertising, design patents, rights of publicity, licensing and other contractual disputes. She represents clients across a range of industries, including consumer products, cosmetics, entertainment, fashion and luxury goods, financial services, food and beverage, pharmaceuticals, professional sports and technology.

Ms. Bannigan has extensive trial experience, helping to secure an over \$20 million jury verdict for client Learning Annex in the United States District Court for the Southern District of New York, among other matters. She also has experience representing clients before the United States Patent and Trademark Office, the Trademark Trial and Appeal Board and the International Trade Commission. Recognized by *Managing Intellectual Property's IP STARS*, *The Legal 500* and *Law360* as a Rising Star, she is known for “translat[ing] complex legal issues into clear pragmatic legal advice.” She is ranked as a top practitioner by *World Trademark Review* (2020), which reports that she has “deep substantive knowledge married to a practical approach and is not intimidated by the most challenging cases or counterparties.”

Ms. Bannigan is also a frequent speaker and panel member for business, legal practice and educational groups across the country and is frequently quoted, mentioned and published in national and international publications, including *Bloomberg*, *Reuters*, *Managing Intellectual Property*, *The World Trademark Review*, *Practical Law*, *Intellectual Property Magazine* and *Law360*, as a legal authority on trademark and copyright matters. In December 2019, Ms. Bannigan testified as an expert before the United States Senate Judiciary Intellectual Property Subcommittee on the issue of fraudulent trademarks.

Ms. Bannigan is also an adjunct professor, teaching Advanced Trademark Law at NYU School of Law and Fashion Law at Rutgers School of Law. She previously was a Clinical Visiting Lecturer at Law at Yale Law School, leading the team of students that helped secure the landmark decision in *Connecticut Coalition for Justice in Education Funding v. Rell*, where the Court declared that several features of Connecticut’s system of education, including the formula for distributing funding to school districts, were unconstitutional.

Ms. Bannigan is active in intellectual property-related professional organizations, including the International Trademark Association, for which she spearheaded the development of INTA’s Pro Bono clearinghouse, was a member of the 2019 Presidential Task Force focusing on corporate responsibility and brands for a better society and, in 2017, was awarded the Volunteer Service Award for Advancement of the Association. She is also Chair of the American Bar Association - IPL Trademark Litigation Committee, as well as Publications Chair for the Fashion Law Committee and a member of the Executive Editorial Board for *Landslide Magazine*. Ms. Bannigan is also a member of the NYC Bar Council on IP and Fashion Law Committee.

Ms. Bannigan has a strong commitment to public service. She has a large pro bono practice and is active in an array of not-for-profit organizations, including for the Cancer Research Institute and Advocates for Children of New York. Prior to joining the firm, Ms. Bannigan worked in the Office of the New Jersey Governor.

Ms. Bannigan joined the firm in 2007. From 2008 to 2009, she clerked for the Hon. Mary Little Cooper of the United States District Court for the District of New Jersey.

Ms. Bannigan received her J.D. with high honors from Rutgers University in 2007, where she served as production editor of the *Rutgers Law Review*. She received a B.A. with honors from Rutgers College in 2002. Ms. Bannigan is a member of the Bars of New York and New Jersey and is admitted to practice before the Southern District of New York and the District of New Jersey.

Alexandra J. Roberts, University of New Hampshire Franklin Pierce School of Law

Alexandra J. Roberts is a Professor at the University of New Hampshire School of Law. She teaches and writes in the areas of trademark and false advertising law, entertainment law, contracts, and law and literature. Her current scholarship focuses on trademark use and distinctiveness generally and how trademarks function on social media in particular.

Professor Roberts holds an A.B. from Dartmouth College, an A.M. from Stanford University, and a J.D. from the Yale Law School. She previously served as the Executive Director of the Franklin Pierce Center for Intellectual Property at UNH Law and as a Visiting Assistant Professor at Boston University School of Law. Prior to entering academia, she was an associate in the intellectual property litigation group at Ropes & Gray, first in its New York and then in its Boston office. Professor Roberts is co-chair of the Junior Intellectual Property Scholars Association (JIPSA) and an Affiliated Fellow of the Yale Information Society project.

Laura A. Heymann, Chancellor Professor of Law, William & Mary Law School

Laura Heymann joined the faculty in 2005. She is a graduate of the University of California at Berkeley School of Law, where she was elected to Order of the Coif and served as the Book Review Editor on the *California Law Review*.

Prior to her appointment, Professor Heymann was the inaugural Frank H. Marks Visiting Associate Professor of Law and Administrative Fellow in the Intellectual Property Law Program at The George Washington University Law School. She has also served as an assistant general counsel at America Online, Inc.; as an associate at Wilmer, Cutler and Pickering in Washington, D.C.; and as a law clerk to the Hon. Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit. Prior to attending law school, Professor Heymann worked as an assistant editor at St. Martin's Press in New York. She received her B.A. in English, *magna cum laude*, from Yale. Professor Heymann was selected by the 2008 graduating class as the recipient of the Walter L. Williams, Jr., Memorial Teaching Award and was the 2012 recipient of the College's Thomas Jefferson Teaching Award. She received a Plumeri Award for Faculty Excellence in 2012 and was the Class of 2014 Professor of Law from 2011 to 2014. She served as Vice Dean of the Law School from 2013 to 2017.

Barton Beebe, John M. Desmarais Professor of Intellectual Property Law, New York University School of Law

Barton Beebe specializes in the doctrinal, empirical, and cultural analysis of intellectual property law. He has been the James S. Carpentier Visiting Professor of Law at Columbia Law School, the Anne Urowsky Visiting Professor of Law at Yale Law School, a Visiting Professor of Law at Stanford Law School, and a Visiting Research Fellow at Merton College, Oxford. He has also taught courses at Hebrew University, Jerusalem, the Center for International Intellectual Property Studies at the Université de Strasbourg, the Munich Intellectual Property Law Center, the State Intellectual Property Office of the People's Republic of China, and the Hanken School of Economics in Helsinki, Finland. In 2007, Professor Beebe was a Special Master in the case of *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 2990 (SAS) (S.D.N.Y.). He is the author of *Trademark Law: An Open-Source Casebook*, which is a free online trademark casebook now in use in over 50 law schools around the world. In 2020, he received the NYU School of Law Podell Distinguished Teaching Award. He clerked for Judge Denise Cote of the United States District Court for the Southern District of New York. B.A. (Chicago); J.D. (Yale); Ph.D. (Princeton).

David H. Bernstein, Partner, Debevoise & Plimpton LLP

David Bernstein chairs Debevoise's Intellectual Property Litigation Group. He is widely recognized as one of the nation's leading intellectual property litigators. Mr. Bernstein is ranked in the top tier by *Chambers USA*, which notes that he is "a luminary in the field and provides high-level strategic thought." *Chambers* has also reported that he "is roundly considered to be one of the finest trademark litigators in the nation." Mr. Bernstein is highly regarded for his "encyclopedic knowledge of trademark law as well as the understanding of strategy needed to win big cases." Clients note he is "excellent on his feet," "an exceptional, dynamic lawyer and a tenacious litigator" who is "just incredible in terms of strategic planning," and "a great thinker, strategist, business adviser, and, when necessary, the best litigator out there, bar none." Mr. Bernstein is recognized by *The Legal 500 US*, where he is seen as "a brilliant litigator," and "the dean" of the IP litigation bar, and is ranked in the top tier in the *World Trademark Review 1000*, where sources note that he is the "one you turn to when you have a fight you cannot lose" and is undoubtedly one of if not the best trademark lawyer in the country." The praise he receives from his peers is equally emphatic: "Going up against him is quite an eye-opening experience. He exudes authority and really does live up to his reputation as an all-star litigator." *Managing Intellectual Property* magazine has selected Mr. Bernstein as the Outstanding IP Litigator of the Year, The International Trademark Association has awarded Mr. Bernstein the President's Award, and the International Who's Who of Trademark Lawyers has selected Mr. Bernstein as one of the top ten trademark lawyers in the world.

Mr. Bernstein is active in alternative dispute resolution. He has served as a neutral in ADR proceedings administered by the London Court of International Arbitration, the World Intellectual Property Organization, the International Institute for Conflict Prevention and Resolution, the International Centre for Dispute Resolution, the Hong Kong International Arbitration Centre, the National Arbitration Forum, and the Czech Arbitration Court.

Mr. Bernstein is an adjunct professor at New York University School of Law and George Washington University Law School, where he teaches Advanced Trademark Law. He has authored or co-authored numerous articles and chapters on intellectual property, as well as the leading treatise on advertising law, *The Law of Advertising, Marketing and Promotion*.

Mr. Bernstein is Past Counsel to INTA, has served on the Board of Directors, co-chaired the Annual Meeting, and chaired the International Amicus and Emerging Issues Committees.

Mr. Bernstein joined Debevoise in 1990. He received an A.B. *magna cum laude* from Princeton University in 1985, an M.Sc. from the London School of Economics and Political Science in 1986, and his J.D. from Yale Law School in 1989. He served as law clerk to the Hon. Robert E. Keeton, in the United States District Court for the District of Massachusetts, from 1989-1990.

Mr. Bernstein is admitted to the bars of California, Connecticut and New York.

Felix Wu, Professor of Law, Cardozo School of Law

Professor Wu's doctorate studies in computer science are foundational to his information law scholarship, which spans freedom of speech, privacy law, and intellectual property law. He has previously written on the limits of online intermediary immunity and on understanding the role of data de-identification in law. His current work explores the relationship between data privacy and theories of free expression.

Wu was previously an associate at Covington & Burling in San Francisco. In 2006-7, he clerked for Judge Sandra L. Lynch of the United States Court of Appeals for the First Circuit. Immediately prior to coming to Cardozo, he was an intellectual property associate at Fish & Richardson in Boston.

Wu received his undergraduate degree in 1996 in computer science summa cum laude from Harvard. He is a member of the Order of the Coif and Phi Beta Kappa.