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AN INTRODUCTION TO “MARSHALL LAW”

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In September 2021, the Center for Intellectual Property Research at the Indiana University Maurer School of Law hosted a festschrift for our colleague Professor Marshall Leaffer, Distinguished Scholar in Intellectual Property Law and University Fellow at the Maurer School of Law. *IP Theory*, the online journal supported by the Center, organized the event, which was dubbed “Marshall Law.” The Marshall Law Symposium featured presentations by leading intellectual property law scholars, many of whom focus on copyright and international intellectual property topics. The resulting symposium volume of *IP Theory*, Volume 12 Issue 1, features contributions from those scholars as a collection of seven podcasts and three essays. These contributions are summarized below.

But first, a few words about the many contributions of Marshall Leaffer himself. Marshall grew up in Texas and attended the University of Texas where he majored in chemistry and linguistics. A highlight of his undergraduate experience was his brief stint as a walk-on member of the University of Texas golf team, which was then coached by the legendary Harvey Penick. Fortunately for the intellectual property law community, Marshall did not pursue a career in professional golf. Instead, after earning his master’s degree at the University of Illinois, he returned to Texas to study law.

Upon graduation, Marshall embarked on an extraordinary career in intellectual property law practicing in both the public and private sectors. During the 1970s, he served as a trademark examining attorney at the U.S. Patent and Trademark Office, as a legal consultant for organizations in Paris, as trademark counsel for American Home Products in New York, and as an

¹ This foreword was prepared in part by Mark Janis, Robert A. Lucas Chair and Professor of Law and Director for the Center for Intellectual Property Research at Indiana University Maurer School of Law. The remainder was a collaborative effort among the Volume 12 Editorial Board members. *IP Theory* would like to thank Professor Janis for his contributions to this addendum.
associate in a New York law firm. From 1977–78, he worked as attorney advisor on the staff of the General Counsel to the U.S. Copyright Office. This was a crucial period in the U.S. copyright system as the 1976 Copyright Act was being implemented.

After completing his work at the Copyright Office and earning an LLM in Trade Regulation from the New York University Law School, Marshall joined the faculty of the University of Toledo College of Law. He taught at Toledo for nearly twenty years, ultimately becoming the Anderson-Fornoff Professor of Law and Values. He taught courses in the primary areas of intellectual property law, but also taught antitrust, torts, law and economics, and a number of comparative and international law courses. His scholarship focused on copyright and international intellectual property law.

Marshall published numerous books and articles on copyright, international intellectual property law, antitrust, and related topics, both in English and in French. While many legal academics become known for a signature idea or a canonical law review article, Marshall is perhaps most celebrated for his single-volume treatise of U.S. copyright law, *Understanding Copyright*, in its Seventh Edition as of the time of this writing. In it, Marshall displays both his celerity with the language and his extensive knowledge of copyright doctrine. It is a pristine work of scholarship about a contentious, complex area of law. Although written to be accessible to law students, the book has become a go-to reference for copyright practitioners and (as many can attest from personal experience) law professors thrust into a role as teachers of copyright.

In 1997, Marshall joined his wife Joelle Bahloul in Bloomington, he at the law school and she at the department of anthropology. At Indiana, Marshall has taught Copyright Law, Trademark Law, Intellectual Property Survey, International Intellectual Property, and other intellectual property law courses. As primary advisor to scores of international L.L.M. and S.J.D. students with interests in intellectual property law, Marshall became a beloved celebrity in far-flung locales across the globe where Maurer alums...
congregate, a status he has retained to this day. Ever the internationalist, Marshall taught as a visiting instructor at many law schools around the globe, most often in France.

Marshall, in our best southern-Indiana-influenced French, we bid you not *au revoir*, but rather *à tout de suite*.

Meanwhile, there is much to learn from the participants in the Marshall Law symposium. In addition to the published articles, journal associates and editorial board members were joined by Intellectual Property (IP) practitioners for long-form episodes of the journal’s *Fire of Genius* podcast. In Episode one, Professor Graeme Dinwoodie\(^2\) shares his expertise on the doctrine of well-known marks in the U.S. and reunites with his co-author, Professor Mark Janis,\(^3\) for a discussion of *Belmora LLC v. Bayer Consumer Care AG* in the 4th Circuit. Episode two features Professor Margaret Chon\(^4\) who articulates her thesis that it is time to move past the “big three” rationales of economics, utilitarianism, and natural law to broaden the conceptual landscape of IP and copyright law. Professor Chon also offers her opinions for solutions to usher diversity, equity, and inclusion into the IP classroom. Providing an international perspective in Episode three, Professor Ysolde Gendreau\(^5\) offers a comparative analysis of U.S. and Canadian IP and copyright law—a comparison apropos given Professor Leaffer’s French ties.

Episodes four and five delve into crossover issues of patent law with copyright law. Professor Daniel Gervais\(^6\) offers a deep dive into artificial intelligence and the differences in artificial intelligence (AI) authorship in patent law as compared to copyright law; further, he acknowledges

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\(^4\) Donald and Lynda Horowitz Professor for the Pursuit of Justice at Seattle University School of Law.

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potentially forthcoming IP issues that may arise as AI technology develops regarding rights of publicity, fair use, and challenges in IP registration that may result in the emergence of a precedential test case. Sharing interest and expertise in international and comparative IP law with Professor Leaffer, Professor Rochelle Dreyfuss\(^7\) expounds upon his views in balancing international IP harmonization with maintaining national differences, especially as it pertains to her work in patent law. Professor Dreyfuss offers her solutions to reforming patent regimes in developing countries saddled with overburdensome requirements from harmonization efforts, a system she and her co-author\(^8\) refer to as a “diffusion” patent system.

The special episodes conclude with discussions from symposium presenters inspired by specific works written by Professor Leaffer. In Episode six, Professor Mike Carroll\(^9\) discusses his symposium contribution on copyright and fair use where he salutes a formative article by Professor Leaffer describing the four fair use factors. Professor Carroll theorizes how a reframing of fair use as an affirmative right with licensing privileges may pose issues for case law, such as *Princeton University Press v. Michigan Document Services*, and he opines on the future of fair use in the European Union in light of the Copyright Directive. Finally, Professor Marty Adelman\(^10\) honors a rare patent article by Professor Leaffer on the equitable defense of patent misuse in infringement cases, and he expounds upon equitable doctrines in patent law and the effects of the lack of jury trials in such equitable patent cases. Listeners are treated to hearing Professor Adelman’s expertise as he is able to refer back to cases in which he has personally testified.

In *Reconciling Copyright “Restoration” for Pre-1972 Foreign Sound Recordings with the Classics Protection and Access Act*, Professor Tyler Ochoa\(^11\) explores the intersection of U.S. copyright law and international copyright and neighboring rights protection. Specifically, Professor Ochoa examines the Classics Protection and Access Act (“CPA”), which provides *sui generis* protection to pre-1972 sound recordings, asking whether it (1) replaces existing protection for pre-1972 sound recordings of foreign origin under the Uruguay Round Agreements Act of 1994 (“URAA”), (2)

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7 Pauline Newman Professor of Law Emerita at New York University School of Law.
8 Daniel Benoliel, Associate Professor of Law at the University of Haifa.
9 Professor of Law and Faculty Director of the Program on Information Justice and Intellectual Property at American University Washington College of Law.
10 Theodore and James Pedas Family Professor Emeritus of Intellectual Property and Technology Law at the George Washington University Law School.
11 Professor of Law at Santa Clara University School of Law.
supplements that protection, or (3) does not apply to pre-1972 sound recordings of foreign origin at all. Professor Ochoa argues that while any of the three options may be plausible in light of the statutory text, the cleanest option is the first. However, he notes, owners or rightsholders of pre-1972 sound recordings will argue the best option is the second, making all pre-1972 recordings eligible for protection under the CPA, but disallowing double damages and profits if the CPA and URAA overlap—Congress would not have had a good reason to provide duplicative remedies.

In *Marshalling Copyright Knowledge to Understand Four Decades of Berne*, Peter Yu\textsuperscript{12} examines the developments surrounding the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) over the past four decades. These developments include the accession of new members, updates to keep pace with new technology, new economic rights, and new external influences.

Professor Yu artfully explores the aforementioned developments in an entertaining hypothetical in which Professor Leaffer is frozen in time in 1978 and awakes in 2021 to explore the modern Berne Convention. Today the Berne Convention has 180 members including the United States (which joined in 1988), China (which joined in 1992), and Russia (which joined in 1994). Over the last four decades the Berne Convention has evolved alongside technology’s transition from photography to cinematography, the development of radio and later television broadcast, and the digital revolution and subsequent file sharing and questions concerning the intersection of artificial intelligence and copyright law. Aside from technology’s influence, external influences like international trade and human rights have and continue to influence the evolution of the Berne Convention. Professor Yu’s tongue-in-cheek conclusion is that if Professor Leaffer had actually been frozen in 1978, there would be an additional consequence: the intellectual property community’s understanding of these developments would be greatly diminished.

In *Life After Google v. Oracle: Three Reflections on a Theme*, Professor Daryl Lim\textsuperscript{13} first reflects on fair use, along with issues surrounding text and data mining for artificial intelligence uses (“AI”), seen through the lens of *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*. Professor Lim highlights recent changes to Singaporean legislation that carved out an exception to copyright infringement for text and data mining, which may

\textsuperscript{12} Regents Professor of Law and Communication and Director for the Center for Law and Intellectual Property at Texas A&M University School of Law.

\textsuperscript{13} H. Laddie Montague Jr. Chair in Law at Penn State Dickinson Law.
prove instructive as the US grapples with the changing landscape of the AI revolution. Professor Lim then turns to substantial similarity doctrine, focusing on Arnstein v. Porter. He discusses the unique challenges presented by software, including how its functional nature makes applying Arnstein in a post-Google landscape difficult. Third, using Alice Corp. Pty. v. CLS Bank Int’l, Professor Lim discusses the current state of software protection at the intersection of patent and copyright law.

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14 Professor of Law at Indiana University Maurer School of Law.