



# Professor Tseming Yang Elected to Earthjustice Board of Trustees

By Michael Branson  
Editor-In-Chief

On Friday, November 8, the Earthjustice Board of Trustees elected Santa Clara University Law Professor Tseming Yang as the newest member of its board.

Earthjustice is a public interest environmental law firm based in San Francisco. The firm was first founded as the Sierra Club Legal Defense Fund, associated but independent from the Sierra Club. It provides free legal representation for clients confronting a range of environmental concerns, including the Sierra Club itself, the World Wildlife Fund, and the American Lung Association. The organization's stated priorities are "preserving our amazing wildlife and special places; protecting the health of our communities by ensuring a toxic-free environment; and promoting clear energy over fossil fuels to combat global warming."

Professor Yang joins a list of well-regarded environmental lawyers and professors, as well as other environmental advocates, sitting on the Earthjustice

Board of Trustees. The board currently has twenty-five members, including Professor

of Law Carmen Gonzalez at Seattle University School of Law, Assistant Professor Patrice Simms at Howard University School of Law. Other prominent members include Judge William Newsom, retired state appeals court judge and father of Lieutenant Governor Gavin Newsom, and Andrew Reich, a television writer and producer.

Earthjustice has played a prominent role in pivotal environmental law cases. In *Sierra Club v. Morton*, Earthjustice attorneys helped establish the standing requirements for citizens to sue for environmental damages. Earthjustice also played a key role in *Massachusetts v. Environmental Protection Agency*, the landmark climate change Supreme Court case that has since led to several current and forthcoming EPA regulations attempting to prevent and mitigate the effects of climate change.

On his legal blog, *citizenyang.blogspot.com*, Professor Yang expressed his enthusiasm about the new position: "I am honored and excited to join this amazing organization, which has fought for the communities, the environment and the public interest for over four decades now. With its 80+ lawyers, it is probably not



Photo Reprinted from Santa Clara Law Magazine

just the largest public interest environmental firm in the country, but also internationally."

Professor Yang's election to the Earthjustice Board of Trustees is the latest in a trend of notable appointments by SCU Law professors. On September 16, Professor Colleen Chien began serving in the White House Office of Science and Technology Policy (OSTP) as senior advisor for intellectual property and innovation. Professor Margaret Russell recently received a Fulbright fellowship by the Council for the International Exchange of Scholars to research human rights jurisprudence in Tanzania. And in 2012, Professor Van Schaack was appointed Deputy to U.S. Ambassador-At-Large for War Crimes Issues in the U.S. State Department's Office of Global Criminal Justice.

Professor Yang joined the Santa Clara Law faculty in 2012 after previously working as deputy general counsel at the U.S. Environmental Protection Agency. Prior to his political appointment, he was a professor of law at the Vermont Law School. He teaches torts, climate change law, international environmental law, and natural resources law.

## New Grading Policy for LL.Ms at Santa Clara Law

By Madhavi Chopra-Bhutani  
For the Advocate

In a first, Santa Clara University School of Law has decided to allow its current batch of students enrolled in the "LL.M. in United States Law" program to be graded for purposes of academic evaluation. This new policy decision has come in the wake of gnawing concerns among LL.M. students on the impediments that non-grading had created for them while pursuing their academic interests at the law school.

For one, as the grading policy was not hitherto applicable to the students enrolled in the LL.M. in United States Law program, they were evaluated on a "pass/no pass" basis, which restricted them from securing a GPA.

Second, a lack of GPA further hindered LL.M. students who wanted to participate as associates to the law school's various journals.

Third, the Bar as well as University regulations in countries like India, for instance, do not recognize an LL.M. degree earned by their nationals from institutions outside their territories unless such a degree is premised on a stipulated minimum GPA.

Fourth, a mandatory eligibility condition for admission to Ph.D. courses in law in institutions across the United States and outside is based on potential applicants securing a required minimum GPA in their LL.M. program.

Fifth and most importantly, a mere "pass/no pass" evaluation unreasonably cloaked all efforts that LL.M. students made while participating in their course work and pursuing their academic goals at the law school.

Beginning this fall semester, the law school has decided to implement the grading policy for its batch of currently enrolled students in the LL.M. in United States Law program. However, as stated in an email from the Office of the Director of Graduate Legal Programs on October 10, 2013, the new grading policy will be optional, in that if such LL.M. students "are satisfied with the Pass/No Pass grading option," they do not have to opt for it.

The choice to be graded has been well-received by LL.M. students, who now feel motivated to strive for higher academic standards in their course-work, and study not just for a "pass". Lila Milford, President of the Student Bar Association, has welcomed this incredible policy change, and has encouraged students to avail this golden opportunity as it will better their academic prospects in the law school. With the new grading policy in place, students enrolled in the LL.M. in United States Law program will not only be able to accurately gauge and monitor their academic performance, but will also be able to aspire for academic felicitations, rewards and scholarships.

Madhavi Chopra-Bhutani is an LL.M. candidate and member of the Dean's Student Affairs Committee

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# Wikileaks Releases Draft Copy of IP Rights Chapter of Trans-Pacific Partnership

By **Brent Tuttle**  
*Staff Writer*

On Monday, November 13th, online activist group WikiLeaks published a recent draft copy of the secretly negotiated Intellectual Property Rights Chapter from the Trans-Pacific Partnership, also known as the TPP. The Trans-Pacific Partnership is a free trade agreement currently in ongoing negotiations amongst the following 12 nations; the United States, Japan, Mexico, Canada, Australia, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei. If approved, the Trans-Pacific Partnership will be a NAFTA-like agreement expected to encompass 40% of the world's gross domestic product. WikiLeaks release of the text comes just a week before the next crucial stage of the Trans-Pacific Partnership negotiations which are scheduled to run from the 19th of November through the 24th in Salt Lake City, Utah.

Prior to the WikiLeaks release, the Trans-Pacific Partnership and its drafting process had been protected by unprecedented levels of secrecy. As a result, the general public has been left completely in the dark, and Members of the United States Congress have been allowed to view only selected sections of the agreement under strict

supervision. Additionally, the U.S. Trade Representative has pushed for more leeway to negotiate and for a "fast-track authority" which would circumvent Congressional review. This lack of transparency has caused some critics to be alarmed.

The Intellectual Property Rights Chapter released by WikiLeaks is especially controversial because of the wide-ranging effects it could have on things such as medicine, publishers, internet services, civil liberties, and biological patents. The leaked document shows almost 100 pages of bracketed text, featuring annotated sections that reveal proposed and opposed positions of each negotiating country. While the released TPP draft is not final, the Electronic Frontier Foundation states that the revelations show "the United States negotiators...pushing for restrictive policies, and facing only limited opposition...from countries like Chile, Canada, New Zealand, and Malaysia."

Some of the specific proposals found

in the IP Chapter of the TPP draft pertain to copyright terms, fair use and fair dealing, intermediary liability, anti-circumvention, temporary copies, and patents.



The text shows plans amongst negotiators for a new floor regarding copyright duration that would be valid for an author's life plus seventy years (United States position) or the life of an author plus one hundred years, as Mexico has suggested. The United States is also lobbying for countries to recognize term lengths of 95 years for corporate works. The Electronic Frontier Foundation

stated that, "such bloated term lengths benefit only a vanishingly small portion of available works, and impoverish the public domain of our collective history."

Furthermore, the draft shows substantial disagreements with respect to the standard of copyright liability Internet Service Providers (ISPs) and other online platforms will be held to. Though still very uncertain in outcome,

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# "Wiggin Out" Over a Wig Purchase Dispute Leads to Online Defamation

By **Jake McGowan**  
*Managing Editor*

At what point does online mudslinging become actionable defamation? In September, an appellate court in California upheld a wig seller's liability for defamatory statements made on online forums, focusing on the false factual nature of the claims.

## Background

Plaintiff Sanders' mother lost her hair from chemotherapy treatment for breast cancer. Sanders bought a wig for her mother from defendant Wiggin Out. She claimed she was told that the wig was custom-made, but Wiggin Out's owner Walsh denies that she ever made that representation. Sanders prevailed in small claims court and subsequently made a post to Ripoffreport.com. In a lengthy "rebuttal" post, Walsh and Wiggin Out made two allegations that Sanders claimed were defamatory. First, Walsh claimed that Sanders paid with an "unauthorized" check. Second, Walsh claimed that Sanders had fabricated a letter from Fed Ex in order to prove that Sanders's mother tried to return the wig to Wiggin Out.

Months later, Sanders found anonymous posts online suggesting that she was receiving "under the table" bribes in exchange for construction contracts. These posts were ultimately traced back to Walsh and Wiggin Out.

In response to the various defamatory posts, Sanders sued Walsh and Wiggin Out for libel, false light, and intentional infliction of emotional distress (IIED). The trial court found that each of the online statements in question were false and defamatory, awarding \$10,000 on the IIED claim, \$10,000 on the defamation claim, and \$4,000 in punitive damages. Walsh appealed.

## Walsh's Defamatory Statements Were Not Mere Opinion

Walsh argued that her statements fell in the category of protectable opinion. As part of this strategy, she harped on the "relaxed communication style" of the Internet and how, in that context, readers would understand her statements as mere opinions. Some prior California cases supported this theory, citing commentators who "likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world."

Despite acknowledging the "fast and loose" nature of online posts, the court refused to accept that online commenters are immune from defamation liability or that online commentary is always opinion. Instead, the court looked to the specific language and found false factual allegations:

"The Yelp.com posting mentioned Cheryl Sanders in connection with awarding city contracts to friends and family members and taking under

the table money, i.e., bribes. The MerchantCircle.com article was even more explicit, accusing Cheryl Sanders of 'giving all the construction business in Anaheim for a under the table bribe.' These statements are not mere opinion."

The court called these "historical facts" and also made sure to point out that Walsh's post on Ripoff Report actually prefaced most of its paragraphs with the word "fact."

## Substantial Evidence Supported Lower Court's Finding of Malice

Walsh said that she held an honest belief that the statements on Ripoff Report were true based on her experience related to the small claims suit. But the court noted that even if this were true, such an honest belief would not cover the various city planning corruption allegations.

In addition, the court noted that Walsh "plainly had a hostile relationship" with Sanders which was evidenced by the Ripoff Report statements:

"The patently false nature of the claims, Walsh's false denial that she posted the statements, and Walsh's hostile attitude towards plaintiff are substantial evidence to support the trial court's finding of malice."

For these reasons, the court affirmed the prior judgment.

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# Rumor Mill with Dean Erwin

By Susan Erwin  
Senior Assistant Dean

Hi All!

Happy November! I hope you all have a very restful Thanksgiving break and come back alert and calm and healthy and brilliant and ready to take finals!

This month, I would like to include a special reminder, particularly for the first years. Remember orientation? Remember convocation? Remember raising your right hand and pledging the following:

*I, [state your name], understand that I am joining an academic community and embarking on a professional career. Because lawyers play a vital role in preserving respect for the rule of law, Santa Clara Law, and the legal profession share important goals and values. Those include:*

- A commitment to integrity, courtesy, civility, and fairness;
- A commitment to complete every



*professional undertaking in a competent, prompt, and diligent fashion;*

▪ *A commitment to conform my conduct to the requirements of law, the rules governing Santa Clara Law, and, upon gaining admission to the bar, the rules governing the legal profession; and*

▪ *A commitment to improve society's access to the legal system, the administration of justice, the quality of legal service and the substance of the law itself.*

*As a lawyer-in-training, I accept these goals and values. I pledge my best efforts to conduct my academic, professional, and personal life to honor these goals and to pursue these values, and thus bring credit to Santa Clara Law and the legal profession.*

If you have some time, you might want to think about what those words mean. For example, just off the top of my head, the promises would seem to suggest that an SCU Law student would never publish negative comments about classmates, or professors, or an entire

gender. Let's use the holidays to take the time to be thankful for our community here at the law school, who respect and value each other.

Remember those pesky MOU's that required you to acknowledge that you understood that you are responsible for reading and complying with the rules in the Student Bulletin and the Academic Integrity Policy?

In case you were looking for some light reading during your break, consider reading through the section that says that Falsifying law school attendance records is considered Dishonest Behavior and a violation of the Academic Integrity Policy. After that, there are some really interesting paragraphs about disciplinary procedures and what kind of problems students found in violation can have passing their moral character determination.

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We did hear a couple of rumors that didn't concern attendance rosters. Some are wondering if they are in a curved class where a lot of students are taking

the class Pass/No Pass, but they are not, if their grades will be affected in any way. No, your grade will not be affected. Professors must give each student in a curved class a letter grade that complies with the curve. Once submitted to our office, we convert the grades to Pass/No Pass. (Pass = a grade of C or higher)

We also heard some grumblings about ALW-W enrollment. APD re-organized the course so that we could offer more seats than we usually do. There were 100 seats for initial registration. We ended up with about 25 students who did not get into any of the sections and were stuck on wait lists. As soon as I finish writing this column, we will be adding 2 more sections and I will be sending out emails to the students stuck on waiting lists. It's hard to predict ahead of time how you all are going to register, but we always go back and look at wait lists and try to fix things. Hopefully, you all will get all the classes you want.

As we go into finals, please remember that we are here to help. If you have questions or problems, stop by Suite 210 or send an email to lawstudentservices@scu.edu.

## Copyright Suit Over Second Life "Terraforming" Will Go To Trial

By Jake McGowan  
Managing Editor

What happens when a virtual world designer sues for "unauthorized" use of a virtual "island?" In late September, a New York district court denied summary judgment and cleared the way for a full trial on a virtual world copyright infringement case.

### Background

This bizarre case stemmed from a payment dispute for digital design services related to the virtual world "Second Life." For those unaware with Second Life, the court described it as an "internet-based simulation in which users appear via digital characters called 'avatars' and interact with a computer-generated environment."

The creators of Second Life (Linden Research, Inc.) sell parcels of virtual space called "islands" that essentially begin as blank slates that look like flat green rectangles. Second Life users can then change these virtual landscapes and populate their island with objects, buildings, and other things they create or purchase—a process called "terraforming."

As a teacher, Defendant Cindy Sheehy saw Second Life as an educational opportunity and worked with her school's technical staff to purchase three "islands" in Second Life that would later be "terraformed" into a virtual classroom for her students. She met Plaintiff Fred Fuchs at a Second Life convention in San Francisco, and ultimately hired his FireSabre consulting company to create digital content and terraform her virtual islands.

FireSabre terraformed a total of six islands for the defendants, referred to as

"Ramapo Islands":

- (1) "The First Three Islands" created in 2005-06, and
- (2) "The Second Three Islands" created in 2007-08.

Unfortunately, both parties were extremely nonchalant when it came to the nailing down the specific details of this relationship. Sheehy claims that Fuchs was a "volunteer" for the First Three Islands, whereas Fuchs claims that he was an independent contractor hired to create the content for \$10,000. But the two parties never executed a formal written contract, let alone discuss who owned the IP rights to this "Ramapo Islands" project.

The school district did eventually pay Fuchs \$5,000 for the terraforming of the Second Three Islands, but the parties dispute whether that sum effectively purchased a copy of the content or merely a license of limited duration. Fed up in 2008, Fuchs submitted forty screenshots of the islands to the Copyright Office and registered his company's digital artwork copyright. He then contacted the defendants and told them that the continued use of any of FireSabre's Second Life content after August 1, 2008 would be "unlicensed."

After that date came and went, FireSabre began engaging in "self-help" and submitted several DMCA takedown requests to Linden Research. It also alleged that the defendants created a copy of the Second Life terraforming and uploaded it to servers for "OpenSim," a different virtual world simulation.



Screenshot of "Ramapo Islands"

Ultimately, FireSabre brought suit for copyright infringement.

### "Terraforming" is Copyrightable Under Section 102

The Defendants first attacked the validity of FireSabre's terraforming copyright, arguing that terraforming should not qualify for copyright protection because it is not "fixed in any tangible medium of expression" within the meaning of § 102. The court did not buy this argument and compared the

terraforming to digital images in video games:

"Plaintiff's designs existed on Linden's data servers and were visible within Second Life for some period of time . . . clearly of more than "transitory duration." The work was "sufficiently permanent . . . to permit it to be perceived" by the students who interacted with the Ramapo Islands simulation."

The court also shot down the argument that the terraforming was not "sufficiently permanent" because students were able to alter it. Defendants were similarly unsuccessful in arguing that the terraforming was not within the scope of FireSabre's copyright because it was not prominently featured in the screenshots Plaintiff submitted to the Copyright Office.

### Dispute Over Authorization Precluded Court From Granting Summary Judgment

In its complaint, FireSabre alleged two instances of infringement: (1) the unauthorized display of the "Second Three Islands" after August 1, 2008, and (2) the unauthorized copying of the "First Three Islands" into the OpenSim environment in early 2011. Ultimately, the court denied FireSabre summary judgment for both instances.

With respect to the First Three Islands, the court claimed that it had not been presented with enough information to give summary judgment on the question of substantial similarity.

As for the Second Three Islands, the dispute over authorization prevented

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# 3-Dimensional Printing: A Global Transformer and a Law Disruptor

By Paola Aguiar  
For *The Advocate*

The famous Industrial Revolution improved old processes in the coal mining, water, chemical and other important industries through new methods of manufacturing that were introduced during the 1770s through the 1840s. Many entrepreneurs patented their inventions, which improved living standards and created a new modern economy with sustained growth. And later, at the end of the 19th and 20th century, the industrial production become massive and the Second Industrial Revolution emerged where electrical, chemical, automotive, hydroelectric, petroleum industries that increased rapidly across the world.

Nowadays, we have a new revolution: High Tech and Digital. Industrial manufacturing started to mutate and develop new processes and methods of production. These new technologies, starring in the market, are disrupting traditional manufacturing and business models.

The manufacturing of new technologies, especially 3D printing, is announcing the development of "The next industrial revolution." 3D printing is not only used by industrial facilities and manufactures but also to benefit the "Do it yourself" community (DIY). One of the benefits is the affordability. A 3D printer, depending on the brand and style, is worth \$1,200 – \$7,000 whereas the rent fee is \$150 – \$250 per month. DIY and hobbyists are rapidly able to prototype designs that are not possible using traditional techniques using different materials such as plastic filaments and metal.

This DIY community has access to these printers without limitation on creating, designing, modifying, and repairing objects without any expertise at all. One of the objectives to offer this printing at a low price is to benefit the public, "do good," by printing useful items. Many social entrepreneurs are already helping others in the health care industry by creating custom hearing aid earpieces and prosthetics.

Many international manufactures are not effective. The entrepreneurs are creating designs and goods themselves without the expensive costs of shipping, delivery and manufacturing. This freedom is destroying competition that depends on overseas suppliers. For example,

China will need to get along with this new technology and reinvent their business model. Perhaps they will need to sell these designs files as a CAD manufacturing package to DIY community.

Manufactures are seeking to make a connection between their hardware and the software. I attended a

conference in Palo Alto organized by the Churchill Club, where Rod Brooks, the founder, Chairman & CTO of ReThink Robotics said that

"Software will replace hardware or make better jobs than manufacturing. If you ask any person, do you want your kid to work in manufacturing? They respond, No. New technologies will bring new jobs in the manufacturing industry."

Jason Blessing from Plex Systems said: "Cloud in manufacturing will take off in the next 7 years, it delivers software to manufactures so the capital cost will drop due to it."

In recent research made by Mc. Kinsey Global Institute, the estimated distribution of potential economic impact in developing economies is 40% in large manufacturing base and many consumers, but lower initial adoption. In contrast with developed countries where there is a 60% of potential economic impact in earlier adoption in manufacturing and by consumers.

For instance, 3D printing, advanced robotics and cloud are getting adapted slowly into traditional manufacturing models in developed countries. However, in poor countries this could be a boom if adapted into the manufacturing industry, but it could reduce the global demand for low cost labor that developing countries provide the world and this it is what drives their economic development.

I think developing countries must rely on these new technologies because they will benefit millions by offering access to electricity in most of the cases and enabling them to connect to the digital world.

They estimate that 3D printing

could have a direct economic impact of \$230 billion to \$550 billion per year in 2025. The DIY community bought many 3D printers models between 2005 and 2013. Thousands of people per month have used Thingiverse and other websites to create or print designs. The downside about 3D printing is that even though you can generate your product tomorrow, you cannot produce over 3,000 units because it is not for mass production. Therefore, the quality will decrease. However the Research

Other designs can be obtained by using Computer-Aided-Designs (CAD) files and objects. However this object can be useful and sometimes can be patentable. If the DIY individual creates a design using the patented item and then shares the design through website with a user who will download, print or purchase copies, it is likely to be a patent infringement. According to the patent law, anyone is liable if they: make, use, offer to sell or sell any patented invention, actively induce infringement (contributory) and offer to sell or sell a component of a patented machine, manufacture, combination or composition or a material or apparatus for use in practicing a patented process, constituting a material part of the invention.

Example: Maria independently created an infringing design

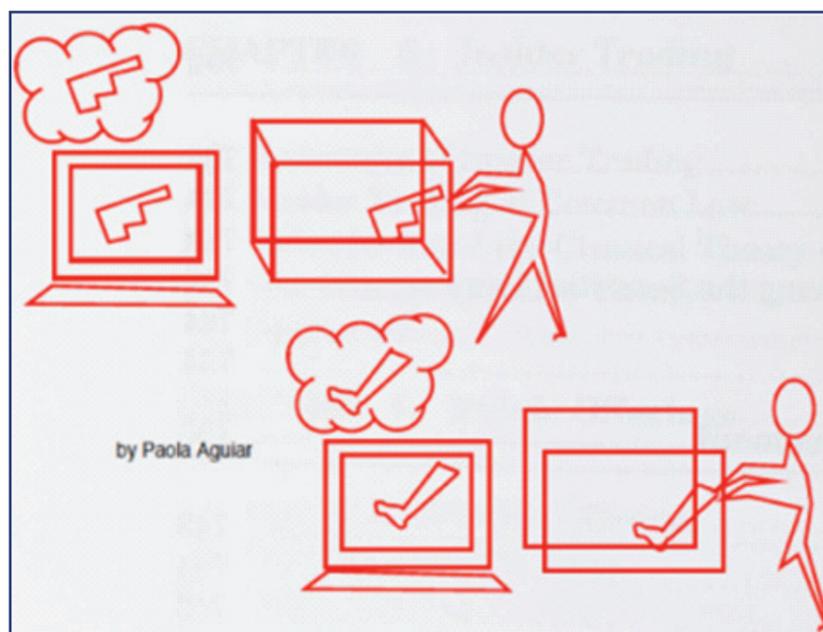
without knowing it was invented by a company XYZ that helps people with amputees. Afterwards, she uploaded her designs to a websites such as Thingiverse. Later, Peter, who is a user, downloaded that design file and printed a copy of the object and also order a custom-printed copy from another website offering customizing and printing services or from home. The Company XYZ will sue for indirect or direct infringement. Maria has lack of intent so perhaps she is not liable for the download, but she may be liable for the copies of the object she printed to develop her design. Peter is also liable for making the robotic hand at home. Also, Thingiverse can be liable for manufacturing and selling it to Peter. Here, Thingiverse is likely to be the first target. Also, under the website's terms, Maria is liable for making the infringing design and must pay all legal fees. Otherwise, if Maria and the website are not liable, the Plaintiff must establish a prima facie case of induced infringement or contributory infringement. The Plaintiff must show that the infringers had knowledge of their infringing actions.

Most 3D printing business models are taking huge legal risks. For instance, a way to avoid litigation

without knowing it was invented by a company XYZ that helps people with amputees. Afterwards, she uploaded her designs to a websites such as Thingiverse. Later, Peter, who is a user, downloaded that design file and printed a copy of the object and also order a custom-printed copy from another website offering customizing and printing services or from home. The Company XYZ will sue for indirect or direct infringement. Maria has lack of intent so perhaps she is not liable for the download, but she may be liable for the copies of the object she printed to develop her design. Peter is also liable for making the robotic hand at home. Also, Thingiverse can be liable for manufacturing and selling it to Peter. Here, Thingiverse is likely to be the first target. Also, under the website's terms, Maria is liable for making the infringing design and must pay all legal fees. Otherwise, if Maria and the website are not liable, the Plaintiff must establish a prima facie case of induced infringement or contributory infringement. The Plaintiff must show that the infringers had knowledge of their infringing actions.

Most 3D printing business models are taking huge legal risks. For instance, a way to avoid litigation

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It is important to keep up with this new technology but also seek a way to deal with IP infringement.

Science Foundation said that this factor will change in the next few years considering that its use has increased enormously in comparison with other years. According to Mark Hatch, Tech Shop, CEO, said "In the future, the software component in

a supply chain will cost nothing so that you can design the same or better furniture with specific details and print it out in wooden material. People will prefer to customize their own home's furniture instead to buy it at the store"

Another downside is that the websites that use designs for 3d printing constitute a potential threat for patentees and their inventions. It is important to keep up with this new technology but also seek a way to deal with IP infringement.

Considering the fact that not many consumers are DIY individuals who are used to fixing things at home, their access will depend on the availability to use it. Some customers like to customize their designs before printing and others only select predetermined design and print.

# HMCE Updates

## *Santa Clara's IP LawMeets Teams Shine!*

HMCE would like to congratulate Santa Clara's IP Lawyering Negotiation teams for their recent success! Our two teams of Erika Ilanan & Chris Placencia and Steve Chao & Nellie Amjadi represented SCU at the Third Annual IP Law Transactional Lawyering Meet. Santa Clara hosted the Western Region on November 1, 2013. In this unique transactional competition, teams drafted a term sheet, did mark ups of their opponents' term sheets, and then represented their client on an IP issue through a series of negotiation rounds. In a field of 12 teams, Erika and Chris won the drafting award for their client side, and Steve and Nellie advanced to the National rounds held by means of video conferencing on November 8, 2013. The teams were coached by Tom Jevens, corporate counsel at Google, Inc. The HMCE Competition Manager was Michelle Ton. Again, congratulations to our teams for their performance at this new and exciting competition, and a big thank you to everyone who helped these teams prepare!

Also, the teams give a BIG thank you to HTLI and all of the SCU law volunteers for making SCU law shine the weekend of the competition. All of the countless hours SCU law students and staff invested in making this competition run smoothly is GREATLY appreciated by the teams.



Left to Right: Chris Placencia, Erika Ilanan, Tom Jevens, Steve Chao, and Nellie Amjadi.

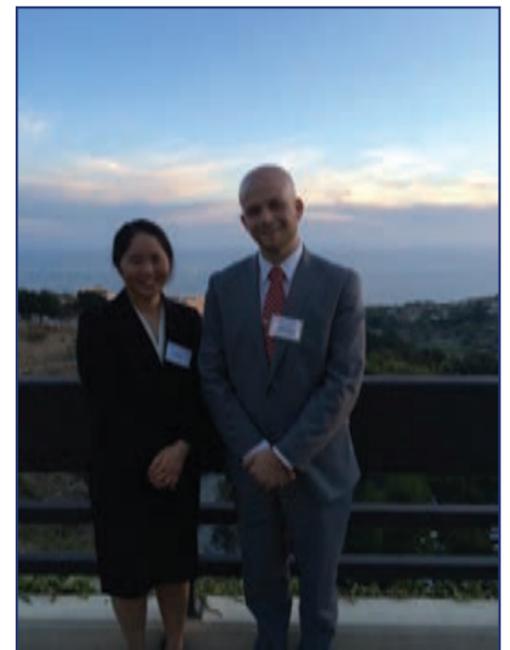


Left to Right: Hector Rodriguez, Elizabeth Uruskyj, Danny Bowman, and Michael Manoukian

## *ABA Negotiation Competition – Region Nine Rounds*

On Friday and Saturday, November 8-9, 2013, we proudly sent two teams to the 30th Annual ABA Negotiation Competition Region 9 Rounds hosted at Boalt Hall in Berkeley, CA, attended by 24 teams from ABA region 9. Our two competing teams were Hector Rodriguez & Michael Manoukian, and Danny Bowman & Elizabeth Uruskyj.

Both teams did a great job at the competition, and Hector and Michael nearly made the final rounds! The teams were both coached by attorney, Jeff Hare. Charlie Lane was the HMCE competition manager who helped cheer on both teams. Thank you to all who sparred with our teams to help prepare them. Please join the Law School community in congratulating both of these teams for a fine showing!



Lisa Omoto and Matthew Coleman at the Pepperdine Entertainment Law Competition

## *Pepperdine Copyright & Entertainment Law*

HMCE congratulations to Matthew Coleman and Lisa Omoto for competing in the 16th annual Pepperdine Entertainment Law Competition. The competition took place on November 9-10, 2013 at Pepperdine Law School in Malibu, CA. Matthew and Lisa went up against the two teams who won the final rounds, so they faced the fiercest of opponents and did us proud in doing so!

A total of 24 teams competed and argued multiple issues, including copyright and trade secret law. The team was coached by Eugene Hahm from Manatt, Phelps & Phillips and Ryan Hilbert from Sheppard Mullin Richter & Hampton. The team was sponsored by the SCU High Tech Law Institute. The HMCE Competition Manager was Gam Galindo. Thank you to everyone who mooted this team and helped them make a great showing at the competition.



Melissa Hoff and Joe Tursi at the Ninth Circuit for the NYC Bar Association Moot Court



Left to Right: Curtis Wheaton, Professor Yvonne Ekern, Sara Rose, and Clay LaPoint

## *NYC Bar Association Moot Court - Region Twelve Rounds*

HMCE congratulates Santa Clara Law's New York City Bar Association Moot Court Competition teams. Regionals were held at the Ninth Circuit on November 15-16, 2013. Oralists Melissa Hoff and Joe Tursi made a strong showing during the first day with Melissa receiving best oralist in their first round. The brief writer was Anne Boyer and the team was coached by Eric Hutchins, Corporate Counsel at Oracle.

Oralists Clay LaPoint and Sara Rose will be advancing to the nationals round in New York in February 2014. Both received best oralist in a round on the first day of competition. Curtis Wheaton was the brief writer and Jason Parkin and Janie Yoo comprised the shadow team. Natalie Kirkish was the HMCE Competition Manager. The team was coached by Professor Yvonne Ekern

Thank you to everyone who helped the teams prepare!

# The Unintended Consequences of “Success” with Drone Strikes

By John Fox  
For *The Advocate*

From Washington’s perspective, the United States’ ability to target and kill enemy belligerents with drone technology has been immensely successful in many regards.

The expansion of stateless terrorist organizations, such as al Qaeda, forced the United States to adapt to the changing nature of warfare. By U.S. definition, unprivileged belligerents, such as al Qaeda operatives, do not abide by the Laws of War. They purposefully blend in with civilian populations so as to disguise their malevolent intent in order to maximize damage.

In response to the elusive nature of these organizations, the United States began conducting drone strikes against al Qaeda operatives and its affiliates shortly after 9/11. These attacks have intensified since Barack Obama became President of the United States.

The unprecedented precision of the Predator’s “Hellfire” missiles permits the United States to engage enemy belligerents with “minimal” collateral damage to civilian populations – at least in theory. The efficiency of the program as a whole has kept terrorist organizations around the world on the run. Speaking very generally, the entire effort has been and continues to be a success.

However, putting the validity of this “success” aside (a position on which I offer no comment), this article will instead highlight some of the unintended consequences of this “success.”

First, a lack of transparency has hindered domestic approval for the program. Virtually all details of the program are classified and it is unclear what relationship Joint Special Operations Command (JSOC) and the CIA have in conducting drone strikes. Further, many legal scholars question its legality. Without transparency, it may be impossible for the legal community to ensure the program’s validity under the law. This is especially troubling as many domestic law enforcement agencies are looking to acquire drone technology in order to mimic the military’s success.

Second, drone strikes in Pakistan and Yemen have resulted in political instability in each country because it infringes on each state’s sovereignty. A U.S. drone strike in a foreign territory highlights that government’s inability to protect and maintain its borders. While Pakistan may

have secretly consented to drone strikes during Pervez Musharraf’s presidency, this is unequivocally no longer the case. An unstable Pakistan, coupled with its nuclear capability, presents an extremely dangerous regional and global threat.

Third, the success of the drone program has delineated al Qaeda’s leadership. Consequently, al Qaeda has splintered into several regional affiliates (e.g., Al Nusra in Syria and Al Qaeda in the Arabian Peninsula in Yemen) that operate increasingly independent of each other. As a result, al Qaeda and its affiliates have grown increasingly less predictable and therefore more difficult to disrupt.

Fourth, the military may be considering how to make the United States’ drone technology even more efficient. It is not inconceivable to think that drones may one day carry nuclear warheads. This proposition raises a significant amount of issues that exceed the scope of this article. In any event, I don’t envy the person who has to tell the President one of our nuclear-armed drones has been hacked, is on a course back towards the United States mainland, and cannot be shot down because we designed it, well, not to be shot down.

Fifth, although effective, it is possible that the United States’ targeted killing policy may create more terrorists. If someone harbored no negative feelings of the United States on Monday, a drone strike killing innocent civilians in that individual’s village on Tuesday is likely to change that.

In general, the frequency of drone strikes is falling. Although there is no indication that drone strikes may be coming to an end in Yemen, there are some signs that the current U.S. administration is considering ceasing drone strikes in Pakistan. During high-level meetings with Pakistan over the summer, Secretary of State John Kerry stated that the drone program will end when the threat is eliminated, adding that he hopes it will be “very, very soon.” However, it remains unclear who will determine and how it will be determined when the threat is eliminated in Pakistan.

In any event, the continued “success” of the United States’ drone technology in response to the proliferation of stateless terrorist organizations around the globe raises several unintended but unavoidable negative consequences that must be dealt with sooner or later.

# 3D PRINTING BRINGS NEW CHALLENGES TO PATENT LAW

“3D PRINTING”  
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is by acting in good faith. Patentees could lose the power to assert their Intellectual Property rights if an infringing design goes popular but DIY individuals, due to fear of patent infringement lawsuits, choose not to share their creations.

Remedies will also minimize legal liabilities because it allows legitimate and good faith patentees to assert their rights while preserving the benefits of the public from freely shared designs.

If a patentee discovers an infringing design, they will send a “cease and desist” letter and demand that the infringing designs be removed. This letter does not determine liability but it does inform the individual that there is a possible infringement that may end up imputing him as liable.

According to Mark Hatch, Tech Shop CEO, told me that “the solution to avoid possible patent infringement is that patentees must negotiate and give a reasonable rate to DIY individuals that it is affordable and will benefit both sides.”

There are mechanisms used by many websites to mitigate the infringement of copyright. They implement a “notice to take down” system that complies with the Digital Millennium Copyright Act (DMCA). Those “take down notices” sometimes are not applicable in patent cases. So many patentees prefer to litigate against a DIY individual to make an example and send a message to others intending to do the same, thereby creating a disincentive to infringe.

Some 3D design websites has users with pseudonyms accounts and it makes it difficult to force disclosure. Patentees must give “cease and desist letters” to websites to get access to pseudonymous users information.

The patentees under these conditions may seek settlement

payments from infringing DIY individuals as revenue.

Patentees are seeking similar protection as DMCA that will protect the patentees to assert their rights and protect the new DIY community inventions. Because many DIY inventions are useful to the community, they must be open source. Therefore, they should not be penalized.

A notice and takedown procedure for websites grants a safe harbor from liability, so long as the sites do not have actual knowledge of infringement.

The DIY community and hosting websites who acted in good faith and with good public purposes can use that as a defense. Also patentees may grant an open license giving some rights to copy and distribution in special cases.

Patented items must be designed by DIY individuals creating useful goods for society. However, DIY individuals must pay a reasonable and affordable rate to license the right to use certain patented items. This alternative helps the DIY community avoid infringing IP rights by acting in accordance with the law and minimize their legal risks. Also websites must ensure that DIY’s inventions must be kept in the public domain and use expired patents designs. However, this could be a thin line that could cause infringement because it creates conflict with public policy. For instance, anybody using hard material can design and print military guns and scrupulously copy and reprint without control. This is a high-risk situation that can be resolved by proposing a modification in the current patent law regulation.

To conclude, the patentees and DIY individuals must act in good faith, grant open licenses to a DIY individual at a reasonable rate, and patent law must implement a similar copyright takedown policy to discourage lawsuits.



Photo Source: [www.dailymail.co.uk](http://www.dailymail.co.uk).

# Copyright Suit Over Second Life “Terraforming” Will Go To Trial

“SECOND LIFE”  
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two instances of infringement: (1) the unauthorized display of the “Second Three Islands” after August 1, 2008, and (2) the unauthorized copying of the “First Three Islands” into the OpenSim environment in early 2011. Ultimately, the court denied FireSabre summary judgment for both instances.

With respect to the First Three Islands, the court claimed that it had not been presented with enough information to give summary judgment on the question of substantial similarity.

As for the Second Three Islands, the dispute over authorization prevented summary judgment for FireSabre:

“While Defendants have done a less-than-admirable job of teeing this issue up for the Court’s attention, they do assert that Sheehy believed the District had purchased the right to the continued use of the content Plaintiff had created for the Second Three Islands at her request.”

Sheehy and the school district claimed that the \$5,000 payment to FireSabre authorized them to continue using and displaying that content. The court gave considerable weight to this question, and noted that such an authorization could have been obtained by an implied license, under the first sale doctrine, or as a volunteered gift. The lack of evidence as to these three possibilities ultimately influenced the court to hold off on granting summary judgment.

## Defendants Unsuccessful in Claiming Fair Use

In addition to the “authorization via implied license” defense, Sheehy and the defendants claimed that their continued use of the virtual islands constituted fair use. But one by one, the court laid out its rationale as to why each fair use factor weighed against a finding of fair use.

1) *Purpose and Character of the Use*: For this factor, the court relied on the distinction as described in Harper & Row:

“[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”

Despite acknowledging that “Defendant’s use of the material in question [was] primarily . . . for nonprofit educational purposes,” the court found that the allegations more closely resembled misappropriation because the defendants stood to gain from exploitation of the digital content without paying the

customary price.

2) *Nature of the Copyrighted Work*: The court quickly weighed this favor against the defendants, noting that FireSabre’s digital artwork “is within the creative ‘core of intended copyright protection’ for which fair use is more difficult to establish.

3) *Amount and Substantiality of the Use*: The court noted that FireSabre has produced evidence, uncontroverted by the defendants, that the amount of content used by the defendants was a substantial part (if not the entirety of) FireSabre’s copyrighted works.

4) *Effects of the Use on the Market for or Value of the Work*: This factor also weighed against fair use, as the court reasoned that “the market in which Defendants’ use of the material occurred is the same market that [FireSabre] is targeting in creating its works in the first place.” By continuing to use the content, the defendants chose not to avail themselves of the “ready . . . means to pay for the use” in the Second Life market.

Since none of these factors weighed in Defendants’ favor, the court denied defendants’ cross-motion for summary judgment. All in all, the court struck down both parties’ summary judgment motions and set the stage for this strange case to proceed to trial.

The lesson here: don’t stiff your virtual landscaper!

Actually, the bigger lesson (too often ignored) is to make sure you have an agreement nailed down and in writing before beginning a time-intensive project. Judging by the earliest entries for FireSabre in the Internet Archives (circa 2007), it seems that the business was in its infant stages and thus less likely to have a firm process in place. But absent any documents outlining the relationship, the “authorization” question loomed heavily over this case and all but prevented summary judgment.

In fact, the major questions here were more factual related and less about the application of copyright law in virtual worlds. The defendants’ attack on copyrightability did not stick, nor did the fair use defense. It’s pretty clear that even educational uses of copyrighted material will not be protected when you’re using the entirety of the work and not paying for it.

As always, we must ask ourselves whether proceeding with a full trial is worth it. Something tells me that when you’re knee-deep in litigation over a few virtual islands, the answer is no. Then again, I can only speak to this issue from a First Life perspective.

# WikiLeaks Brings Unexpected Transparency to TPP Negotiations

“TPP”  
From Page 2

it is clear that the United States is pushing hard for draconian copyright enforcement amongst all other member nations. Canada appears to be fighting back rather admittedly against the United States, and many other member countries are suggesting language that would limit the liability of ISPs, allowing each state to create an enforcement system that works best given the specifics of their national laws and priorities.

Also included in the TPP document is evidence that shows the United States is aggressively lobbying for provisions that would expand the grasp of patent law and also limit the manner in which patents can be revoked. In addition, the United States has also proposed that patents for the invention of plants and animals be made available. Both of the above policy suggestions have been met with widespread resistance amongst other member states.

While the Trans-Pacific Partnership is still in active negotiations, critics are fearful of the effects of its implementation. Stanford Professor Sergio Puig, who recently lectured on the Trans-Pacific

Partnership at Santa Clara Law stated, “the TPP IP Chapter revealed by the leaks shows how international trade regimes have been instrumental in the expansion of IP rights for traders and investors. For good or for bad, including aggressive IP chapters in trade agreement is a regime shifting strategy used by actors who stand to benefit from these types of legal regimes.”

There are claims that the United States Trade Representative is ambitiously pursuing policy that would overwhelmingly “put the desires of major content and patent owners over the needs of the public.” Additionally, WikiLeaks Founder and Editor-in-Chief Julian Assange stated that, “if instituted, the TPP’s IP regime would trample over individual rights and free expression, as well as ride roughshod over the intellectual and creative commons. If you read, write, publish, think, listen, dance, sing or invent; if you farm or consume food; if you’re ill now or might one day be ill, the TPP has you in its crosshairs.” It remains to be seen what will become of the Trans-Pacific Partnership, but certainly the WikiLeaks release has raised several reasons for concern.

# Wig Purchase Leads to Online Defamation Lawsuit

“WIGGIN OUT”  
From Page 2

First of all, I would appreciate if anyone could explain the main differences between *custom* and *generic* wigs—the opinion does not mention the delta in quality or price. Apparently, however, it was enough to start an online war of words that would escalate and spill over into the courtroom.

Sometimes, you can’t help but marvel at the great things happening on the Internet. Duolingo, Khan Academy, Justinguitar, Wikipedia. . . Right now, people all over the world are online learning and becoming better people.

Other times, you can’t help but place your palm on your forehead, close your eyes, and slowly shake your head. This is one of those times.

This is not to say that sites like Ripoff Report and Merchant Circle shouldn’t exist, but does posting a rant online truly *help* matters? Do prospective customers really use them to *prepare* for a purchase, or are they more like an online diary where venting has the potential of hurting the other side’s business? At the same

time, how does it help to “rebut” these rants with extremely specific falsehoods? In this case, it seems it was clear sailing on the high road.

Regardless of the ridiculous origin of the lawsuit, this case is interesting in another respect because the defense is essentially trying to capitalize on the public’s skeptical perception of Internet conjecture. On one hand, the “anonymous” nature of the Internet does invite these types of “fast and loose” factual claims. Readers are often told to take *everything* on the Internet with a grain of salt, let alone unmoderated forum posts. Even younger readers are often able to spot “trolls” and brush off incendiary comments knowing the content is untrue and only meant to get a rise out of the target. How far are courts willing to go to punish this type of online mudslinging?

On the other hand, the court is right that the allegations in controversy are definitely *specific* factual allegations damaging to Sanders’s reputation. Whether on the Internet, in print, or elsewhere, it is not accurate to portray them as mere opinion.

## Issue Spotting *The Malaise in Miami*

By **Bill Falor**  
Staff Writer

Whether you tune in to the Worldwide Leader or any of the broadcast networks for America's Grandest Game, you're likely aware of the recent developments that have all but torpedoed the Miami Dolphins' season. And while the likelihood of the Fins making the playoffs after this media-driven inquisition leaves room for debate, another discussion is currently unfolding, one that may be of interest to law students considering careers in tort and labor & employment law.

For the uninitiated, Jonathan Martin, an offensive tackle, has left the team abruptly after accusing offensive guard Richie Incognito of "team building" tactics tantamount to unfettered hazing. The evidence is damning and includes incendiary texts, nasty voicemails, and a poorly received prank at a pregame meal that broke the proverbial camel's back. To represent his legal interests, Martin has retained veteran sports attorney David Cornwell of Gordon & Rees, a behemoth litigation and transactional firm with offices all over the US.

A graduate of Georgetown Law, Cornwell is a heavy hitter with more than 25 years of experience in sports. Among other accomplishments, he developed the NFL's Minority Hiring

Program while as Assistant Legal Counsel at the NFL, dabbled as an agent with clients like Troy Aikman and Steve Young, and worked as general counsel at Upper Deck, the trading card company. He's the Gloria Allred of the sports world, and he's who you call when you're an athlete with legal issues.

With such great evidence of harassment and world-class counsel, Martin's case seems like a slam dunk, or in his case, a pancake block. But what would be his best avenue upon which to seek relief against Incognito?

If Martin goes with a tort claim, he might start with assault. A typical assault claim arises from an intentional act that creates a reasonable apprehension of immediate harmful or offensive contact. Martin's case is solid with "offensive" contact considering the nature of the Incognito's actions. However, proving intent might be a bit of an issue: after all, Incognito has maintained throughout this entire mess that he never intended to psychologically damage Martin.

Martin might also try an intentional infliction of emotional distress claim. Such an action requires the plaintiff to show that the defendant acted intentionally or recklessly in an extreme and outrageous manner, causing the plaintiff to suffer severe emotional distress. Here, the threshold is lower, so Martin can charge that Incognito acted

recklessly. However, two questions may trouble a court. One, did Martin suffer distress rising to the level of "severe emotional distress"? And two, was his disavowal of his chosen profession due to Incognito's actions or were there other reasons for his sudden departure?

Martin might also look to sue under a hostile work environment. Under a Title VII race-based hostile work environment claim, a member of a protected group must show that, because of his/her membership in the protected group, he/she was subjected to unwelcome race-based harassment affected a term, condition, or privilege of his employment. At first blush, Martin's biggest obstacle here would be proving that such harassment came as a result of his being black and not from his perceived lack of toughness. As Incognito has maintained throughout this whole ordeal, his race-laced communication with Martin wasn't race-based antipathy but rather jovial, lighthearted banter between long-time pals.

Until we know more about the situation, as reports trickle down from



Photo Source: AP.

various news sources, it remains difficult to discern both Martin's and Incognito's plans. Furthermore, along with Martin's contract and the NFL's 2011 Collective Bargaining Agreement, the vicarious liability of Dolphins, given the alleged order from head coach Joe Philbin to "toughen up" Martin, warrants further examination in the context of a potential lawsuit.

In any case, something clearly toxic pierced the omerta-like veil of secrecy indigenous to the modern NFL locker room. Given the hyper-rapidity at which stories are broken in today's media, there's little doubt the situation will become more clear sooner rather than later. Whether, if at all, Martin turns to the courts to right the wrongs done to him, and whether, if at all, a court and/or jury is receptive to his complaint, remain unresolved as of this writing.

## Nothing On But Reruns *MLB Votes to Dramatic Increase in Video Replay*

By **Michael Bedolla**  
Sports Editor

Pity the poor sports referee. Referee's have no home game. Players and coaches ceaselessly work to manipulate them into gaining more favorable calls. They are criticized by legions of fans, who think referees are merely blind fools at best, or actively conspiring against a particular team at worst. Perhaps no other job has such an ungrateful and impossible to please audience as the referee. But now, their job may be getting easier, and it is replay technology that is to thank.

Video replay in sports has quickly grown into an indispensable tool for assisting on-field officials to make the correct call and ensuring the final score is free from error. As televised sports entered the modern era, with its multiple video angles and slow-motion capabilities, sports fans and journalists were able to dissect every close or controversial call made by referees, often mere moments after the call had been made. One by one, sports leagues developed procedures to take advantage of this technological evolution, using video replay as a de facto appeals process whereby coaches could challenge the call made, or officials could choose to consult in instances where they admitted another look would be advantageous.

Each sport has embraced video replay with differing levels of acceptance. Instant replay was embraced in NASCAR and racing circuits, where high speeds and "photo finishes" could frustrate the human eye's most focused attempts at making a correct ruling without assistance. In the NFL, a head coach has the power to challenge calls that are not (or less) favorable to his team, but this power is not absolute: certain categories of calls are non-reviewable, and the number of challenges at a coach's disposal is limited. For the NHL, replay is reserved only for whether a goal has been scored or should be disallowed, and is not even conducted in the arena where the game is played, but by league officials in the NHL Situation Room in Toronto. The NBA uses replay sparingly, only for buzzer-beater shots at the end of quarters

and overtimes. While all of the leagues will use replay for post-game evaluation in determining fines and suspensions, every league has modified the video replay process to only the particular circumstances it believes warrant supplemental review.

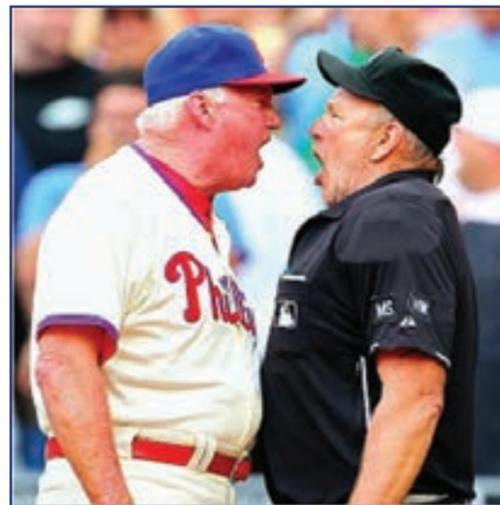
MLB, on the other hand, defied this trend and fiercely opposed instant replay. From balls and strikes to the infield fly rule, baseball is a sport where determination of rules is far more subjective, and this subjectivity is celebrated and cherished. Baseball traditionalists argued that the "human element" provided a connection with the game's humble beginnings in the mid-19th century. Fans worried about what the cost of implementing a replay system would be: imposing even more delays on what can be an already tediously slow game. The prevailing thinking was that replay was unnecessary or redundant, and that bad calls would average out - a team that suffered an unfavorable call in one instance would likely receive a beneficial call later.

Unfortunately, the cost of refusing to modernize baseball proved too high, as the mistakes of umpires had career-changing implications and determined champions. Dirk Denkinger's blown base-running call in the 9th inning of the 1985 World Series gave the Kansas City Royals, down to their final 3 outs, the life needed to rally to a Game 6 win, taking the championship the following evening. In 1996, umpires did not see 11-year old Jeffrey Maier interference, instead awarding the Yankees a game-tying home run. And in 2010, Detroit pitcher Armando Galarraga was denied a perfect game when umpire Jim Joyce incorrectly ruled the final batter safe at first. And after every controversial call, sports commentators from local

news programming to ESPN would inflame public outcry through efficient, multi-angled dissection of the call in question.

In response, MLB has finally joined the rest of the sports world in allowing video replay on its own terms. The league already had capitulated to demand and allowed replay for "boundary calls" on whether home runs were fair or foul, or if there was fan interference. Now, managers will be allowed to challenge two calls throughout the game, and successful challenges may be

reused. While balls and strikes are exempted from challenge, other controversial plays such as whether base-runners are safe or whether a fielder made a diving catch can now be reviewed. The tradition of a manager storming home plate to scream in the face of an umpire will be eliminated (or at least reduced) as calls argued in such a way become ineligible for review. And, taking a page from the NHL, all appeals will be conducted and decided at a single location, by officials at the MLB's head office in New York. While the process still is contingent upon approval from the Players Association and



Former Phillies Manager Charlie Manuel advocates for a reversal of a call on appeal - Source: Getty Images

Umpire's Union, no opposition is expected.

An appeals process is a crucial component to reaching a fair and just decision, whether it's in the courtroom or on the playing field. Umpires, like judges, are fallible, and many times make decisions without all of the facts, or misapply the laws. Video replay in sports subjects umpires and referees to what judges would consider a Clearly Erroneous standard of review: calls are not overturned unless is definite video evidence that the on-field decision was incorrect. Unlike the legal world, however, most fans are content with this process; there's no need for a Supreme Court of Sports.