

INTELLECTUAL PROPERTY LAW GETS EXPERIENCED

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I. INTRODUCTION

A decade ago, in *Clinical Legal Education and the Public Interest in Intellectual Property Law*, I described with my faculty colleagues our motivations for launching a public interest intellectual property law clinic at the American University Washington College of Law.² That article

¹ Professor of Practice of Law and Director, Glushko-Samuelsan Intellectual Property Law Clinic, American University Washington College of Law. I would like to thank the intellectual property scholar-advocates who imagined and created the elegant foundation for the current law school IP clinical community. Special thanks to my IP clinic colleagues Peter Jaszi, Christine Farley, Josh Sarnoff and Ann Shalleck and also to Pamela Samuelson and Bob Glushko for their vision and support. I am also always inspired by the sustained public interest work and achievements of my IP clinical colleagues. Thanks also to Ann Bartow and Dean Megan Carpenter for giving me the opportunity to revisit this work at UNH Law School’s “IP Redux” conference.

² Victoria Phillips et al., *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735 (2008).

introduced our goals and framework for a pioneering clinic framed around a variety of live-client student representations performed under close faculty supervision, weekly case rounds focusing on issues experienced directly by the students in their representations, and a seminar built around a year-long lawyering simulation addressing the public interest dimensions of intellectual property. In that article, we chronicled one live-client student representation in the copyright policy area, the Copyright Office's 1998 Digital Millennium Copyright Act's exemption proceedings, to illustrate our effort to help students better understand the interaction of theory, doctrine, and practice in the dynamic field of intellectual property law.

In this essay, I reflect on developments in the decade since publication of that piece and explore the growth and maturing of the new community of law school intellectual property law clinics. I find that in most respects these new clinics stand comfortably on shoulders of the pioneers of the clinical legal education movement. The founders of the early clinical programs were responding to the social ferment and legal rights explosion of the 1960s. They envisioned the clinical method as much more than merely a way to enrich legal education with professional and skills training. They also saw it as a means of encouraging law schools to attend to the legal needs of the disenfranchised and to engage students in the pursuit and understanding of social justice.³ In the last decade, the IP clinical community has matured to serve the very same access to justice goals. The new clinics are strong voices in the IP realm for the public interest, consumer and civil liberties communities. The IP clinic community has also expanded and inspired much needed access to pro-bono IP and related legal services

³ Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1932–33 (2002).

for underserved communities of creators, non-profits, small businesses, and start-up entities.

II. GETTING EXPERIENCED

The number of IP and related clinics has exploded in the past decade.⁴ The most recent survey conducted by the law school clinical community shows that Transactional and IP clinics are among the fastest growing segment of law school clinical offerings.⁵ The new IP clinics gained momentum from a variety of forces including an increased emphasis on experiential learning in the law school curriculum, the emergence of specialty clinics, the increased intellectual property activities of existing transactional law clinics, and most importantly, an increased need for intellectual property legal services for individuals and entities of limited means given the rise of the new internet economy.

The development of these clinics has been influenced by the general expansion of experiential learning across the law school curriculum. The trend towards more experiential opportunities throughout education, including law schools, has accelerated in the last few decades.⁶ Direct calls for

⁴ See Cynthia L. Dahl & Victoria Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 CLINICAL L. REV. 401 (Fall 2018) (surveying all the new IP and technology clinics and discussing work taken on and innovations in this new community).

⁵ See ROBERT R. KUEHN & DAVID A. SANTACROCE, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., THE 2016-17 SURVEY OF APPLIED LEGAL EDUCATION, 8-9 (2017), http://www.csale.org/files/Report_on_2016-17_CSALE_Survey.pdf.

⁶ See generally David I. C. Thompson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 1-3 (2014); Veronica Donahue DiConti, *Experiential Education in a Knowledge-Based Economy: Is It Time to Reexamine the Liberal Arts?*, 53 J. OF GEN. EDUC. 167 (2004); Becky Beaupre Gillespie, *The Evolution of Experiential*

curricular change in legal education were sounded in the 1992 ABA MacCrate Report, the 2007 Carnegie Report, and in the 2015 ABA requirements mandating experiential learning opportunities for all students.⁷ These reports all agreed that the best training for lawyers is not in a curriculum focused exclusively on study of legal doctrine and case law, but one that integrates doctrine with training in skills and focuses on the development of each student's professional identity.⁸ With each passing year, more and more experiential learning has been demanded in the legal academy. The most recent ABA requirements are a

Learning, THE UNIVERSITY OF CHICAGO LAW SCHOOL (Oct. 3, 2017), <https://www.law.uchicago.edu/news/evolution-experiential-learning>.

⁷ AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, at 16–17 (2015), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf [*hereinafter* ABA STANDARDS AND RULES OF PROCEDURE]; WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–8 (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf; AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, (1992), [<https://perma.cc/6X7G-4GEL>] [*hereinafter* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT].

⁸ The Carnegie Report noted:

[M]ost law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.

SULLIVAN ET AL., *supra* at note 7, at 6.

culmination of this gradual evolution. They mandate at least six experiential credits for graduates of accredited law schools.⁹

Outside the academy, rapid changes sweeping across the economy and technology landscape have also helped to shape this trend. Most significant was the migration to digital technology and the development of the new internet-based economy. The new economy ushered in an expansion in the need for increased expertise in intellectual property and technology-related legal services.¹⁰ In many respects, the new community of IP clinics has evolved to address the emerging needs of the digital world.¹¹ Some were launched explicitly to promote public interest IP policy by extending the voice of advocates guarding the critical balance in IP between protecting creative endeavors and promoting access to information and creative work.¹² Many of the newest offerings were initiated primarily to provide pro bono assistance with IP rights acquisition through participation in the United States Patent and Trademark Office's Law School Clinic Certification Program permitting student practice in trademark and patent prosecution.¹³

The ABA MacCrate Commission observed that a lawyer should be committed to the values of “contributing to

⁹ ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 7, at 16–17 (“One or more experiential course(s) totaling at least six credit hours.”).

¹⁰ See generally Anthony Reese, *Copyright and Trademark Law and Public Interest Lawyering*, 2 U.C. IRVINE L. REV. 911, 918 (2012).

¹¹ See KUEHN & SANTACROCE, *supra* note 5, at 7–8 (demonstrating that clinics focusing on immigration, transactional law, and IP reported the largest percent increase between 2011 and 2014 surveys); see also Dahl & Phillips, *supra* note 4.

¹² The clinics funded by Pamela Samuelson and Robert Glushko were early examples of this type of clinic.

¹³ See Act of Dec. 16, 2014, Pub. L. No. 113-227, 128 Stat. 2115 (USPTO Law School Clinic Certification Program). See generally Jennifer Fan, *Institutionalizing the USPTO Law School Clinic Certification Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327 (2015).

the profession's fulfillment of its responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them and to enhance the capacity of law and legal institutions to do justice.¹⁴ The maturing IP clinical community is answering this call. Pro bono legal assistance and expertise in IP law has historically been unavailable through legal services entities and the general practice law school clinics. Until very recently, pro bono IP representation was also very rarely provided by private law firms.¹⁵ The new network of IP clinics has emerged to increase pro bono activity in this field. It serves as both a needed policy voice for consumers and civil society advocates and provides direct legal services to those unable to afford assistance in the specialized IP legal marketplace.

III. IP CLINICS HAVE BECOME A STRONG VOICE FOR JUSTICE IN THE IP SYSTEM

In a keynote speech several years ago to the law school clinical community poverty scholar Peter Edelman noted:

Whatever we're teaching, we need to make sure that students know the historical and structural context for the issues they are working on, particularly in clinics that represent people on an individual basis... Law teachers throughout the school should take part in the

¹⁴ LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT, *supra* note 7, at 140.

¹⁵ See Raymond Miller, *The Real McCoy Part 3: How to Bridge America's Innovation Gap*, IP WATCHDOG (Nov. 8, 2012), <https://www.ipwatchdog.com/2012/11/18/the-real-mccoy-part-3-how-to-bridge-americas-innovation-gap/id=30103/> (recognizing the gap of intellectual property attorneys providing pro bono work for entrepreneurs).

conversation about expanding access to justice in all the meanings of the phrase¹⁶

Edelman makes clear that access to justice should mean not only providing those without means access to lawyers (the “access”), but access to justice must also mean fighting to address underlying inequality by engaging in the larger social justice fight (the “justice”). He urged law schools and their legal clinics to claim their responsibility to contribute to widening access to justice on both levels. In this vision, law school clinics should both connect lawyers to low-income communities and provide representation not only on an individual basis, but also by way of activities that help to build community, in terms of empowerment and concrete transactional projects.¹⁷ He urged clinical faculty to think more about how we can configure our work so that in addition to helping people one-by-one, we think about the structural problems that contribute to people being in poverty.¹⁸ A progressive view of access to justice must include “normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.”¹⁹

In the last decade, IP clinics have continued to encourage law students to learn about the relationships among IP theories, policies and practices, especially those that implicate access to justice. Our students have experienced the stories of clients seeking IP protection as

¹⁶ Peter Edelman, Carmack Waterhouse Professor of Law and Public Policy & Faculty Director of the Center on Poverty and Inequality, Georgetown University Law Center, Keynote Address at the 2015 AALS Conference on Clinical Legal Education, Law Schools’ Rule in Increasing Access to Justice (August 2015).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ UNITED NATIONS DEVELOPMENT PROGRAMME, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL: A PRACTITIONER’S GUIDE TO HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE (2005).

well as clients for whom the legal framework of IP laws restrict their ability to engage in educational, creative, innovative or culturally significant endeavors. By serving as the lawyers for many different kinds of clients affected by the rapid changes in IP law and policy, our students are witnessing first-hand the tensions reflected in approaches to protecting access to information and the products of creative endeavors. In their daily client representations IP clinics serve as law and policy laboratories to test the effects of various IP theories and regimes on consumers and the diverse creative client community.

IP clinic students are forced to wrestle with the inherent conflict in the language of the U.S. Constitution as well as the Universal Declaration of Human Rights. Both documents grant a right freely to participate in the cultural life of the community but also the right to protection of the moral and material interests resulting from production. Student attorneys come to see in their own work that the two principles—access to information and a rationale for its restriction—are in tension and that this tension central to how law structures our cultural life.

Clinical scholar Jane Aiken has observed that the final stage of a lawyer and law student’s development is “justice readiness.”²⁰ At this stage a student or lawyer “demonstrates an appreciation for context, understands that legal decision-making reflects the value system in which it operates, and can adapt, evaluate, and support her own analysis.” The “justice ready” lawyer can become proactive in shaping legal disputes with an eye toward social justice. Today IP clinics and their students are becoming justice ready. Nearly half of the growing IP clinic community engages in some kind of policy advocacy to make the IP system fairer for all. Clinic students are routinely engaged

²⁰ Jane Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 291 (2001).

in drafting white papers, preparing amicus briefs, and filing comments and replies in regulatory rulemaking proceedings. This advocacy also takes the form of educational outreach projects such as best practices guides, legal toolkits, and curricula for IP and technology educational programs. Other policy projects include FOIA requests, federal and state lobbying, and policy research and education of federal, state and local legislatures. Some clinics also engage in impact litigation efforts in copyright, trademark, patent, and trade secret areas as well as privacy, FOIA requests, free speech, and right of access advocacy. The clinics represent clients as varied as consumers, small entrepreneurs, disability groups, children's groups, prisoners, civil rights groups, the Native community, scholars, and countless creatives. In such respects, IP clinics have answered Edelman's call for promoting access to justice and play an important role in educating communities of creators and decision makers on the need for just laws in this specialized area.²¹

Indeed, many of the consumers, scholars, and creators seeking (and being granted) exemptions under the anti-circumvention provisions of the DMCA, the illustrative representation in our earlier article, have over the last decade been successfully represented by the new community of IP clinics. Some of the clinics taking on these matters are among the oldest in the community and several were funded by seed money and named for IP scholar and Berkeley Law Professor Pam Samuelson and her husband Robert Glushko. As described in our previous article, our own clinic students have long been involved in advocacy related to the DMCA rulemaking. In 2006, our clinic was asked to provide representation in these proceedings for clients seeking exemptions from prohibitions contained in the Act. The DMCA amended U.S. copyright law by adopting new Section 1201, which prohibited circumvention of

²¹ See Dahl & Phillips, *supra* note 4.

technological measures on digital media that effectively control access to or copying of copyrighted content on that media.²² This legislative prohibition also provided authority for the Librarian of Congress to adopt three-year renewable exemptions to the access prohibition for particular “classes of copyrighted works,” when users of such works “are, or are likely to be” “adversely affected” in their ability to make lawful non-infringing uses of these works such as fair use.²³

Peter DeCherney, then an Assistant Professor in the University of Pennsylvania’s Cinema Studies Program, retained our clinic to request an exemption that would be important for his and fellow cinema studies professors who wanted to use clips from encrypted films in their teaching.²⁴ Our clinic’s successful efforts on their behalf ultimately encouraged others to join in subsequent efforts to chip away at the prohibitions created by the DMCA on the fair use of works for important educational, cultural, artistic, consumer, and creative purposes. In the most recent round of the Copyright Office’s process, our students once again represented Professor DeCherney who sought further expansion of his previous exemptions for additional scholarly purposes.²⁵ In this round, seven other law school IP clinics also represented clients seeking particular exemptions in the proceedings.²⁶ The clinics represented

²² 17 U.S.C. § 1201 (2012).

²³ *Id.*

²⁴ See Jeanne Leong, *Cinema Studies Prof Obtains Exemption to Allow Use of Copyrighted Movie Clips in MOOCs*, PENN TODAY (Nov. 5, 2015), <https://penntoday.upenn.edu/2015-11-05/latest-news/cinema-studies-prof-obtains-exemption-allow-use-copyrighted-movie-clips-moocs>.

²⁵ Peter DeCherney, *Petition for New Exemption under 17 U.S.C § 1201*, U.S. COPYRIGHT OFF., SEC. 1201 RULEMAKING: SEVENTH TRIENNIAL PROC. (2018), <https://www.copyright.gov/1201/2018/petitions-091317/class1/class-01-newpetition-decherney-et-al.pdf>.

²⁶ See U.S. Copyright Office, *Comment Letters on Proposed Exemptions Against Circumvention of Technological Measures Protecting*

clients as varied as the Electronic Frontier Foundation, Center for Democracy and Technology, Authors Alliance, American Association of University Professors, Organization for Transformative Works, Interactive Fiction Technology Foundation, Association of Transcribers and Speech-to-text Providers, Association of Research Libraries, American Library Association, American Farm Bureau Federation, Museum of Art and Digital Entertainment, Software Preservation Network, National Corn Growers Association, and the National Farmers Union.²⁷ As an example, the Colorado Law Samuelson-Glushko Technology Law and Policy Clinic filed on behalf of organizations such as the Association on Higher Education and Disability arguing for an exemption for disability service professionals to circumvent the technological protection measures on video games.²⁸ The University of Southern California Gould School of Law Intellectual Property and Technology Law Clinic argued for an exemption for farm equipment articulating how certain anti-circumvention

Copyrighted Works (2018), <https://www.copyright.gov/1201/2018/comments-031418/>.

²⁷ See U.S. Copyright Office, Comment Letter of U.C.I Intellectual Property, Arts, and Technology Clinic on Proposed Exemptions Against Circumvention of Technological Measures Protecting Copyrighted Works (2018), https://www.copyright.gov/1201/2018/comments-031418/class1/Class_01_Reply_Authors_Alliance_et_al_.pdf; U.S. Copyright Office, Comment Letter of Colorado Law Samuelson-Glushko Technology Law & Policy Clinic on Proposed Exemptions Against Circumvention of Technological Measures Protecting Copyrighted Works (2018), https://www.copyright.gov/1201/2018/comments-031418/class2/Class_02_Reply_ASTP_et_al_.pdf [*hereinafter* Colorado Reply Comments]; U.S. Copyright Office, Comment Letter of California Western School of Law New Media Rights Clinic on Proposed Exemptions Against Circumvention of Technological Measures Protecting Copyrighted Works (2018), http://www.librarycopyrightalliance.org/storage/documents/EFF_NMR_OTW_1201_Comment_proposed_class_1.pdf.

²⁸ See Colorado Reply Comments, *supra* note 27, at 5–6.

measures inhibit the ability of farmers to repair their own equipment, threatening their livelihood.²⁹ Were it not for the advocacy assistance offered by these law school IP clinics, none of these groups or individuals would have had a meaningful voice in these important debates. Clinic participation helped to contribute to the broader justice mission of exposing the real harms felt by real people as a result of the statute. In the last decade, law school clinic advocacy in these proceedings and others have helped to push back against the consumer unfriendly protectionism and injustice inherent in many aspects of the existing IP regime.

IV. IP CLINICS HAVE ENHANCED ACCESS TO PRO BONO IP ASSISTANCE

The earliest forms of clinical legal education embraced hands-on legal training through the provision of access to legal services for traditionally unrepresented clients.³⁰ The first clinics were inspired by the thinking of legal realists like Karl Llewellyn and Jerome Frank who advanced the view that students must learn about law as a means to an end rather than as an end itself.³¹ The realists conceived of the law as a public profession charged with inescapable social responsibilities. The experiments in early

²⁹ See U.S. Copyright Office, Comment Letter of University of Southern California Gould School of Law Intellectual Property and Technology Law Clinic on Proposed Exemptions Against Circumvention of Technological Measures Protecting Copyrighted Works (2018), https://www.copyright.gov/1201/2018/comments-031418/class7/Class_07_Reply_AFBF_NCGA_NFU.pdf.

³⁰ See generally Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); John S. Bradway, *The Objectives of Legal Aid Clinic Work*, 24 WASH. U. L.Q. 173 (1939); Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

³¹ Frank, *A Plea for Lawyer-Schools*, *supra* note 30; Bradway, *supra* note 30; Frank, *Why Not a Clinical-Lawyer School?*, *supra* note 30.

clinical legal education found a strong advocate in William Pincus, Vice-President of the Ford Foundation.³² Pincus was an advocate for legal services for the poor and felt strongly that law schools should play a role in addressing the lack of access to justice.³³ Under his leadership, the Ford Foundation provided the first funding to law schools to establish legal clinics to serve the poor.³⁴ Civil rights and poverty lawyers moved to the academy to start the first wave of law school clinics grounded in service to the poor.³⁵ As we enter the newest wave of clinical legal education, law school clinics continue to play an important role in making access to justice a reality for many low-income and disenfranchised communities. They do so not only by exposing law students to the legal problems encountered in the daily lives of the disadvantaged, but also by allowing students to connect with the obligation to find substantive and creative ways to respond to unmet legal needs.³⁶

The new IP clinical community is rising to meet this access to justice mission as well. The most common way that these clinics provide access to the IP system to those with limited means is through intellectual property rights acquisition. This work is handled by most IP clinics. Their students obtain trademarks, including performing trademark searches, drafting clearance memos and opinion letters for clients, and filing and prosecuting applications for federal registration.³⁷ Some clinics also handle patent prosecution including performing prior art searches and drafting opinion letters, and the filing of provisional and non-provisional

³² See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 18–19 (2000) (reviewing the history of clinical legal education).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ *Id.* at 15–16.

³⁷ See Dahl & Phillips, *supra* note 4.

patent applications. IP clinics also engage in related counseling and transactional work for clients, including advising on fair use, counseling regarding cease and desist letters, and drafting and negotiating a wide variety of licenses and contracts.³⁸

One of the most innovative and successful developments in expanding the delivery of IP pro bono assistance has been the creation and expansion of the U.S. Patent and Trademark Office's Law School Certification Program established in 2008.³⁹ This program came about as a result of a 2006 request for student practice in the agency by our IP Clinic.⁴⁰ The background research and underlying theory supporting the petition was created by our clinic students themselves. We proposed the creation of a student practice rule in the USPTO modeled on the numerous student practice rules in state and federal courts across the country. Our IP clinic students had been appearing in federal court under these rules in litigation matters, but were restricted from participating in the IP rights acquisition process at the USPTO on their own. Over the years, other federal agencies had also adopted rules explicitly permitting students in law school clinics to practice before them in various capacities.⁴¹ In the request we noted that as the importance to the economy of trademarks and patents had grown, law school clinical programs had gradually been

³⁸ *Id.*

³⁹ See Act of Dec. 16, 2014, Pub. L. No. 113-227, 128 Stat. 2115 (USPTO Law School Clinic Certification Program). See generally Fan, *supra* note 13.

⁴⁰ Letter & Memorandum from Washington College of Law Intellectual Property Clinic to James Toupin and John Whealan (Oct. 31, 2006) (on file with author) [hereinafter Letter & Memorandum from WCL IP Clinic].

⁴¹ See Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207, 234 (2015).

expanding their representation of clients needing these services. In fact, law school clinics (through and in the names of their supervising faculty) had been increasingly appearing before the Office to file and prosecute both trademark and patent applications. At the same time, more law school clinics were being created that focused specifically on providing intellectual property legal services to those unable to afford quality legal services in the marketplace.

The request noted that student practice in the USPTO would accomplish a number of short-term and long-term goals for applicants, the agency, and law students given the growing community of IP and transactional clinical programs.⁴² Student practice would increase access to justice by allowing individuals and entities that otherwise would not obtain quality legal services in the marketplace to receive competent legal representation. It also would signal to the bar and to the public the agency's commitment to assuring fair treatment for all clients, regardless of their wealth, income or background. Authorizing law student practice would also improve the quality of the representation of clients' legal interests before the PTO relative to pro-se appearances (or in some cases representation by entities engaged in consumer fraud). In many circumstances, allowing law students to practice would reduce the work of and improve the decisions made by the agency staff. Most importantly, the request noted that authorization of student practice would improve the quality of legal education of law students, by providing practical opportunities for them to engage in advocacy under the supervision of qualified law professors. We also argued that these educational benefits would ultimately accrue to the USPTO, as trained students subsequently might practice before or ultimately be hired as attorneys there.

⁴² Letter & Memorandum from WCL IP Clinic, *supra* note 40.

After thoughtful deliberation, in 2008, the USPTO initiated its Law School Clinic Certification Pilot Program.⁴³ It certified six law school IP clinics and granted their enrolled clinic students limited recognition to practice before the USPTO under the guidance of their clinical faculty supervisors. While clinic students had been practicing under their faculty supervisor's name and bar license, the new rule allowed students to take ownership over the process of drafting and filing either patent or trademark applications for their real-world clients. It granted them the authority to sign applications, respond to Office Actions and to communicate directly with patent examiners and trademark attorneys in prosecuting the applications they had filed.⁴⁴ Word of the pilot program spread throughout the clinic community and in 2010, the agency expanded it to add ten more clinics for trademark practice. Only two years later, 11 patent and nine more trademark clinics were added to the program. In 2014, an additional nine patent and 15 trademark clinics joined the Program. Of the 42 law school clinics that were then certified for student practice, 17 were certified for patent and trademark work, 19 were certified only for trademark practice, and the remaining six clinics were only certified for patent practice.⁴⁵

Given the growing reputation of the pilot program, the noted benefits to pro se and low income applicants and the desire by many law schools to participate, Congress enacted legislation on December 16, 2014 authorizing the program to continue for ten years.⁴⁶ Just this year, the

⁴³ See *Law School Clinic Certification Program*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic1>.

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ An Act to Establish the Law School Clinic Certification Program of the United States Patent and Trademark Office, and for other purposes, Pub. L. No. 113-227, 128 Stat. 2114 (2014).

USPTO announced that 20 new law schools joined the program, and five currently participating law schools have added a second clinic during the 2016-2018 expansion.⁴⁷ Eight more law schools were added to both the patent and trademark portions of the program, five added to the patent portion of the program, and twelve to the trademark portion of the program. The total number of participating law schools now stands at 63.⁴⁸ This program and its participating law schools have assisted numerous clients desiring IP rights to further their start-up businesses and nonprofits. In the 2017 fiscal year, the USPTO reported that the law school clinics had undertaken 1889 representations and obtained 39 patents and 363 trademarks for their clients.⁴⁹ The aspirations noted in our original request for student practice at the agency have been realized. In its first report to Congress on the program the USPTO reported:

More than 2,700 law school clinic students have been able to practice patent and/or trademark law before the USPTO under the guidance of a Faculty Clinic Supervisor. Not only has this provided superior legal training and invaluable experience to these students, but by providing their IP services to the public pro bono, this has also increased access to legal representation for the public. Specifically, by expanding education about patents, trademarks, and the patents and trademarks system at the law school level, independent inventors and entrepreneurs that have otherwise not been able to obtain quality legal services, have been afforded access to the competent legal representation necessary to succeed and compete in today's economy.⁵⁰

⁴⁷ See *Law School Clinic Certification Program*, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ UNITED STATES PATENT AND TRADEMARK OFFICE, REPORT ON THE LAW SCHOOL CLINIC CERTIFICATION PROGRAM (2016),

The student practice rule benefits clients, local economies, the USPTO and countless IP clinic law students across the country. Many IP clinic graduates have also been hired onto the USPTO examining corps. Much like the early Ford Foundation grants for the first law school clinics, this program was a creative and unique collaboration responding to unmet legal needs in the IP field and has served a catalyst for clinic growth.

V. CONCLUSION

The legal realists and the faculty of the first law school clinics did not set out to transform law schools into trade schools providing training in only practical lawyering skills. The pedagogy of clinical legal education is centered on the continual interaction of theory, practice and reflection. Rules and doctrine are intertwined in that iterative process. I feel confident that the new IP clinics have taken their rightful place in the clinical community and are serving the goals envisioned by the early theorists and founders of the clinical legal education movement. Karl Llewellyn wrote that a lawyer’s work “is impossible unless the lawyer who attempts it knows not only the rules of the law . . . but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the working situation he is called upon to shape”⁵¹ Our continuing goal as an IP clinical community should be to introduce our students to the “working situation” of clients needing IP assistance and give them a voice in the IP issues of the day. Clinical legal education has long provided access to legal representation and a robust public voice for the disenfranchised or under-funded stakeholders. It has also

https://www.uspto.gov/sites/default/files/documents/USPTO_Law_School_Clinic_Cert_Program_Report-ec_2016.pdf.

⁵¹ KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 17–18 (Oxford Univ. Press 2008).

been instrumental in helping law students to comprehend the important social concerns of the day. Ten years later, it is very clear that the growing and robust IP clinical community is well positioned to continue to serve the twin goals underlying meaningful access to justice.

