

the **ADVOCATE**

Volume 68 | No. 1

January 2025

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Anniversary Article on page 44

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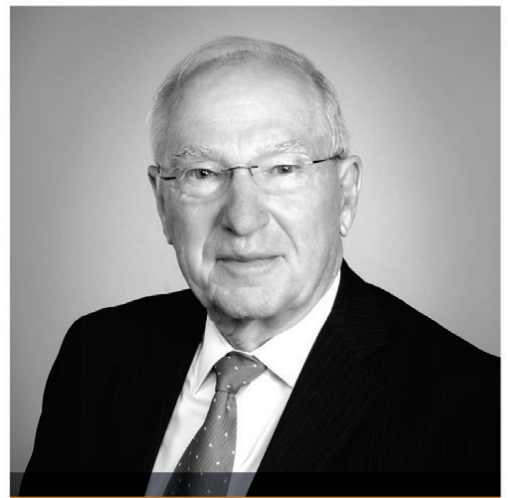
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On the Cover



On the cover of this issue are the columns of the United States Supreme Court building in Washington, D.C., signifying the importance of the SCOTUS decision in *Loper Bright Enterprises v. Raimondo* and the end of *Chevron* deference. This issue's Featured Article by Teague Donahey discusses the impacts of this case on intellectual property law. Photo by David via Adobe Stock.

Featured Article

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Teague Donahey

Sponsored Article

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Celebrate 100 Years with Us!

Lindsey M. Welfley

Welcome to 2025—a very special year for both the Idaho State Bar and the Idaho Law Foundation! This year, both organizations celebrate significant milestones. The Idaho State Bar turns 100 and the Idaho Law Foundation turns 50. Thank you for picking up our first issue of 2025!

This issue is sponsored by the Intellectual Property Law Section and includes articles on various interesting topics. First, Celia Leber discusses the dangers of the “patent thicket” and whether or not federal rulemaking is the appropriate avenue to handle the issue. Following that, Skylar Schossberger explores the complex world of AI emerging technologies and how these advancements intersect with the intellectual property landscape.

We get to read about the impact of the First Amendment on public performance rights in law student, Andreea Livanu’s article. Next, another U of I law student, Blaykleigh Smythe, writes on the “Bad Spaniels” case and how trademark rights overlap with first amendment protections.

This issue’s Featured Article by Teague Donahey dives into the impacts of the recent end to *Chevron* deference on intellectual property law—the *Loper Bright* decision was one of the numerous high-profile decisions that categorized the United States Supreme Court’s 2023-2024 term.

This issue also includes the first of several articles highlighting notable events throughout our 100-year history. After sifting through old transcripts and historic records, different authors from our Bar’s Anniversary Committee will pen an article covering a decade or two. Judge Michael Oths has written this issue’s article on the earliest forms of law practice in Idaho, the formation of the Idaho State Bar during the 1920s, and various happenings in the 1930s.

We hope you enjoy this issue and look forward to reading each of the articles on our history throughout this year. Cheers to a wonderful 2025!

Best,



Lindsey M. Welfley

Communications Director

Idaho State Bar & Idaho Law Foundation, Inc.



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Resolve to Get Involved in 2025

Jillian H. Caires

Welcome to 2025! The Idaho State Bar hit a big milestone this year as it turns 100. This is the last of my columns as president of the Idaho State Bar. I have learned so much about the Bar over the last three years. The Bar is supported by an amazing team of employees and volunteers who care deeply about the members of the bar, the public, and our profession. To keep our Bar thriving for the next 100 years, WE NEED YOU! There are many ways to get involved in the Bar and I am confident that there is an opportunity for everyone to participate.

So, as we move into 2025 and the 100-year celebration of the Bar, I call upon each member of the Bar to resolve to get involved. Please consider trying out one of these ways that you can get involved in 2025:

1. Attend our 100-year anniversary celebration. 100 years is a reason to celebrate, and this one is going to be great! Keep your eyes open for more details!

2. Run for Commissioner. Go big! In 2025 we will have elections for new commissioners from the Second and Fourth Districts. (The First and Second Districts share a commissioner, alternating every three years and the Fourth District is represented by two commissioners). As a commissioner, you get a front row seat to all the amazing work of our Bar. If you are passionate about our profession and want to really get to know the bar, I strongly recommend that you consider running for commissioner.

3. Run for your local district's leadership. If you aren't ready to run for commissioner,

or if there isn't a seat open in your district, consider running for leadership in your local district. I spent three years as an officer of the First District. It was a great way to get to know the attorneys in my district and to get involved as an attorney early in my career. It takes a lot of work to plan CLEs and events for an engaging district bar and talented, dedicated attorneys are always needed!

4. Become a bar exam grader. Grading the bar exam takes a very dedicated group of volunteers, and it's a great service to the Bar!

5. Write an article for *The Advocate*. It is my understanding that *The Advocate* is one of the few bar publications in the country that is still comprised completely of content written by volunteer authors;

we don't rely on any paid content, and you won't find any AI-written articles here. Each issue is sponsored by a different Practice Section of the bar, which brings me to my next suggestion...

6. Join a Practice Section of the Bar. Did you know there are 23 Practice Sections? There is something for everyone and every practice. Sections range from Agriculture Law to Young Lawyers and Appellate Practice to Health Law.

7. Volunteer at Lawyers in the Library. Through this program, lawyers in Coeur d'Alene, Boise, Nampa, Mountain Home, Garden City, and Meridian can offer pro bono services in an approachable, bite-sized manner. Some libraries even offer a virtual option, so you can volunteer without leaving the comfort of your office!

8. Take on a mentee. Sign up for a formal program, like one through the law school, or keep it informal. While on the Roadshow in November, we heard from a member of the bench that some young attorneys would benefit from more mentorship. One way that was suggested to reach out to mentees is simply to reach out to a judge in your community and offer to serve as a mentor for folks new to the practice.

9. Attend a CLE, or better yet, volunteer to lead one! My good friend Caitlin O'Brien and I led an ethics jeopardy CLE for several years in the First District. We always learned a lot in our preparation and had a great time presenting the CLE to our peers.

10. Judge a law school competition. I recently had the opportunity to serve as a judge for Gonzaga's negotiation competition. It was so fun to spend some time with 1Ls and watch as they learned a little about the art of negotiation.

11. Attend the Admissions Ceremony. The highlight of my time as President of the Bar was attending the Fall 2024 Admissions Ceremony. It was a great reminder of how blessed I am to practice as an attorney in Idaho. I was excited to share in the excitement of the day as the new admittees celebrated the great accomplishment of becoming an attorney. Your next chance for this celebratory pick-me-up is May 2, 2025.

12. Nominate an attorney for the Distinguished Jurist, Distinguished Lawyer, Outstanding Young Lawyer, Professionalism, or Pro Bono awards. You can make a nomination on the Bar's website at any time.¹

13. Put your fitness-related New Year's resolutions to good use by training for the Access to Justice Fund Run. Fun fact, the Access to Justice Fund Run was Idaho State Bar Executive Director Maureen Braley's Legacy Project for the Idaho Academy of Leadership for Lawyers. Which brings us to...

14. Commit to growing your skills as a leader and apply for the Idaho Academy of Leadership for Lawyers ("IALL"). Applications for this highly regarded leadership program will open in June 2025. The program is designed specifically for lawyers and gives participants the opportunity to hone their leadership skills while building lifelong relationships with practitioners from throughout the state.

15. Give back to those who have served. The Idaho Military Legal Alliance offers pro bono services to Idaho's military population. Find out more and how you can get involved on their website.²

16. Get a laugh in to support democracy (and Attorneys for Civic Education ("ACE")) by attending Hilarity for Charity. ACE members recognize that the key to a healthy, functioning democracy is a citizenry that is educated and knowledgeable about the U.S. Constitution and the importance of the rule of law to the continued health of our democracy. That is a mission we can all get behind! Learn more here on their website.³

The ideas listed here are by no means exhaustive of all the ways you can get involved with the Idaho State Bar in 2025, but I hope it inspires you to try something new, and I hope to see you around the Bar this year!



Jillian H. Caires is an Idaho native and a proud Washington State University Cougar and Gonzaga Bulldog. After clerking for the Honorable Benjamin Simpson, Jillian spent several years in private practice in Coeur d'Alene before joining the in-house legal team of Avista Corporation. In her free time, Jillian enjoys baking, gardening, walking her standard poodle, and spending time with her family.

Endnotes

1. <https://isb.idaho.gov/about-us/awards/award-nomination-form/>.
2. <https://ilf.idaho.gov/imla/>.
3. <https://www.attorneysforciviceducation.org/>.

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Executive Director's Report

Maureen Ryan Braley

Hello, and Happy New Year! I am Maureen Ryan Braley, the new Executive Director of the Idaho State Bar and the Idaho Law Foundation. As we all know, Diane Minnich served in this role for over 30 years and has retired at the end of 2024. Diane is an extraordinary leader who made a major impact on the legal profession in this state. It is humbling to follow in her footsteps, and I will miss hearing her infectious laugh reverberating through our hallways.

If you already know me, I am excited to work with you in my new role. If you do not know me, here is some information about me, so we can get to know each other. I was born in the Midwest, raised in the Southwest, and educated at Gonzaga University and Gonzaga University School of Law. I moved to Idaho in August 2004 to clerk for Chief Justice Gerald F. Schroeder of the Idaho Supreme Court. Following my clerkship, I worked for Holland & Hart, Meuleman Mollerup (now closed), and as a Deputy Prosecuting Attorney in Ada County. I sought employment with the Bar to capitalize on my legal experience while committing to public service. In 2011, Diane hired me as the Director of Admissions,

then in 2019, I was promoted to Associate Director of the Bar and the Foundation.

I love Idaho. My love for this state grew in the Panhandle while I attended Gonzaga. In the past 20+ years, I have enjoyed exploring this state from Priest Lake to the Henry's Fork to the Owyhees. I also enjoy traveling around our state on business and am often in Coeur d'Alene, Moscow, Lewiston, Idaho Falls, Twin Falls, and Caldwell.

I applied for the Executive Director position because I care about and am committed to the Bar's and the Foundation's missions: promoting high standards of professional conduct for attorneys, increasing access to legal services, and enhancing public understanding of the law. It is exciting that my first article as Executive Director coincides with the 100th anniversary of the Bar and the 50th anniversary of the Foundation. In 2025, we will celebrate the organizations' histories. A joint Bar/Foundation Anniversary Committee will hold a marquee event in July 2025 to commemorate the anniversaries. The anniversaries are also an opportunity to consider our future. To that end, my priorities include improving attorneys' digital experience with our organizations and providing meaningful opportunities for in-person engagement around the state.

We have a talented team of employees at the Bar and Foundation. We are committed to executing our regulatory functions and fulfilling the organizations' missions. I am fortunate to work with such talented professionals. The Bar and Foundation also rely on you, Idaho attorneys, to execute their missions. I have had the privilege of working with great Idaho attorneys serving as bar exam graders, Board members, District Bar officers, and committee members. Thank you for committing your time to improving our profession. If you are interested in getting involved with the Bar, please reach out to me. We would love to have your help.

I look forward to working with you.



Maureen Ryan Braley is the Executive Director of the Idaho State Bar and the Idaho Law Foundation. Maureen is a "double Zag," having earned her undergraduate degree in history and her law degree from Gonzaga University. She clerked for Chief Justice Gerald F. Schroeder of the Idaho Supreme Court and practiced law for six years in Boise before joining the Idaho State Bar staff in 2011 as the Director of Admissions. In 2024, she became the Executive Director.

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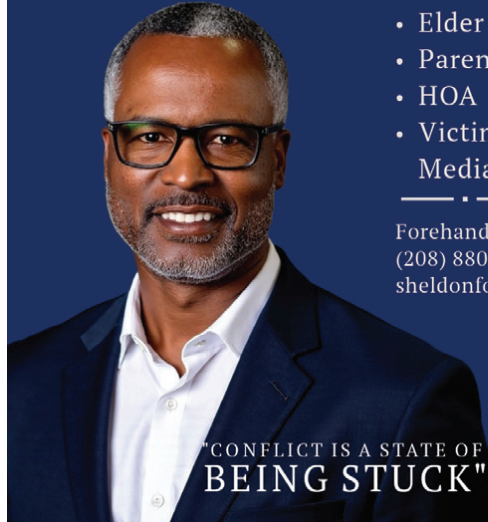


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IDAHO LAW FOUNDATION

How Does the Work of the Idaho Law Foundation Uphold and Reaffirm the Rule of Law?

Sunrise Ayers
President, Idaho Law Foundation

As a new year begins, it is my honor and privilege to address my fellow Idaho attorneys and update you on the important work of the Idaho Law Foundation.

First, to those I don't already know, I would like to provide a brief introduction. My name is Sunrise Ayers. I began my term as President of the Idaho Law Foundation ("ILF") in July 2024, taking over from Fonda Jovick. Fonda did incredible work as ILF President, and I am grateful for the opportunity to continue that work in the year ahead. I've been a member of the ILF Board since 2016 and am a passionate advocate for the Foundation's mission of increasing access to legal services and enhancing public understanding of the law.

As President, my priority in the year ahead is for ILF's work to be a positive force for upholding and reaffirming the rule of law. In my view, that can be accomplished by ensuring we are educating the public, in an accessible way, about the role judges and lawyers play in ensuring all persons, institutions, and entities are accountable to the law. The ILF is doing that work through our Law Related Education Program ("LRE"). In 2025, LRE will grow the mock trial program with the addition of middle school mock trial and the courtroom journalist contest. LRE will also introduce the Seniors & the Law publication and continue with our annual Constitution Day event.

Additionally, ILF's work upholds the rule of law by providing access to legal services to those in our state who cannot

afford private attorneys through the Idaho Volunteer Lawyers Program ("IVLP"). For the public to trust in our courts and judicial systems, they have to believe they have equal access to those systems. ILF's work connecting low-income Idahoans with pro bono attorneys helps achieve the promise of equal access to justice, while also helping Idaho attorneys meet their professional obligations under Rule 6.1 in ways that are personally and professionally fulfilling. In 2025, IVLP aims to develop attorney resources and trainings that will ensure attorneys practicing in all areas of law feel comfortable providing much needed pro bono services. The trainings will include checklists, explanation of self-help forms, and tips for providing advice and counsel to *pro se* litigants.

The important work of the ILF is only possible with the support of the attorneys of our great state. We rely on your donations to support mock trial, pay for printing and distribution of educational publications such as "18 in Idaho" and "Seniors & the Law," fund the staff needed to run Idaho's mock trial and Idaho Volunteer Lawyers Program, and other worthy projects. You can donate to support the ongoing work of ILF when you fill out your annual licensing form or visit us online at idaholawfoundation.org. ILF also benefits immensely from the many attorneys who volunteer their time to support our mission. Whether your passion draws you to taking a case for IVLP or volunteering as a mock trial judge, the time you donate to ILF pays dividends that make our communities stronger.

50TH ANNIVERSARY OF THE IDAHO LAW FOUNDATION:

This year is also notable as 2025 is the 50th anniversary of the Idaho Law Foundation. We are excited to take this opportunity to reflect on the many accomplishments of the ILF over the last 50 years. An Anniversary Planning Committee has been formed and the ILF Board wants to thank the Committee members for the time they are devoting to this project. The 2025 celebrations are still in the planning process, but we anticipate they will include: launching a website containing historical information related to the Idaho State Bar and ILF; publication of *Tent to Towers*; and holding an anniversary event in the summer of 2025. Stay tuned for more details!



I cannot discuss what ILF has planned in 2025 without touching on the big changes happening at the Bar. After 39 years of dedicated service to the Idaho State Bar and its membership, Diane Minnich retired as Executive Director in December 2024. Diane leaves behind a legacy of excellence and a strong and supportive Bar. The entire ILF Board wishes to thank Diane for her years of leadership. Stepping into the Executive Director role, Maureen Ryan Braley will bring her years of experience at the Bar and a passion for the ILF's mission to the position. The ILF Board is excited to work with Maureen and we wish her many successes in the years ahead.

Each of us who has passed through the gauntlet of law school and Bar passage now enjoys both the privilege and the responsibility of being part of a profession that plays a critical role in our society and democracy. I look forward to working in collaboration with each of you to find ways our profession can meet the standards set by the great American attorneys who have come before us, such as Abraham Lincoln, Thurgood Marshall, Sandra Day O'Connor, and Alexander Hamilton, of using our time and talents in the service of others. Finally, may our work as lawyers and judges in 2025 be an example to all of the integrity and strength of the rule of law. As Abraham Lincoln said, "Let every

American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others."



Sunrise Ayers is the President of the Idaho Law Foundation. She graduated from Northwestern School of Law of Lewis and Clark College and the College of

Idaho. Sunrise is the Executive Director ("ED") of Idaho Legal Aid, where she has worked for over 18 years and practiced largely in the areas of elder law and housing law before moving into the ED role.

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IDAHO VOLUNTEER LAWYERS PROGRAM

Idaho Volunteer Lawyers Program

Since 2009, Pro Bono Week has been a national celebration of pro bono service. Legal organizations across America participate to recognize the need for legal services and to thank those who give their time to provide it.

The Idaho Volunteer Lawyers Program (“IVLP”) celebrated this year by hosting a free CLE in partnership with Idaho Legal Aid Services on eviction defense. Cassandra Cooper and Cory Christensen presented the CLE. Development and housing costs in Idaho continue to displace many residents. The CLE provided information on the eviction process and prepared attorneys to assist in their practices or as volunteers. This CLE is available on demand for free to any attorney interested in volunteering.¹

In addition to IVLP’s regular legal clinics, during Pro Bono Week IVLP joined with the Association of Corporate Counsel (“ACC”), Mountain West Chapter, to offer a legal clinic at the Boise Public Library. These clinics provide an opportunity for attorneys to step outside of their practice areas in a supported environment and assist those in need. IVLP appreciates the

ACC for offering their time and expertise providing guidance to self-represented litigants trying to navigate the court system.

To close out Pro Bono Week, IVLP hosted a simple estate clinic together with Rachel Murphy and Shaila Buckley. In early 2024, Rachel and Shaila approached IVLP with an idea for quarterly clinics for low-income and at-risk individuals, providing clients with signed and notarized copies of a will and power of attorney. These clinics have been a tremendous success. IVLP is thrilled to partner with these attorneys to bring this vulnerable population peace of mind.

IVLP would like to thank the Idaho Military Legal Alliance and Idaho Trial Lawyers Association Street Law Clinics and their volunteers for providing their clinics during Pro Bono Week and throughout the year.

With over 5,000 requests for legal service in a year, IVLP recognizes that the need for service far exceeds the number of available volunteers. Thank you to the attorneys who volunteered in 2024, whether it was

on-going cases, or agreeing to take a new case. Your efforts are appreciated and truly make a difference in the lives of Idahoans who would otherwise be without legal assistance.

As we begin this new year, we would like to invite attorneys who have not worked with us before to join our community of volunteers. Your skills are unique, and we are happy to work with you to meet your pro bono aspirations, whether that be the 50 hours a year encouraged by Rule 6.1, or just 50 minutes per month offering advice on how to navigate the complex legal system. When you provide pro bono work through IVLP, your time will be recognized as valuable, and you will be helping those in the greatest need.

Let’s work together in 2025 to close the justice gap in Idaho and provide low income and at-risk individuals and families with equal access to justice!

Endnote

1. <https://isb.fastclic.com/store/seminar/seminar.php?seminar=204673>.

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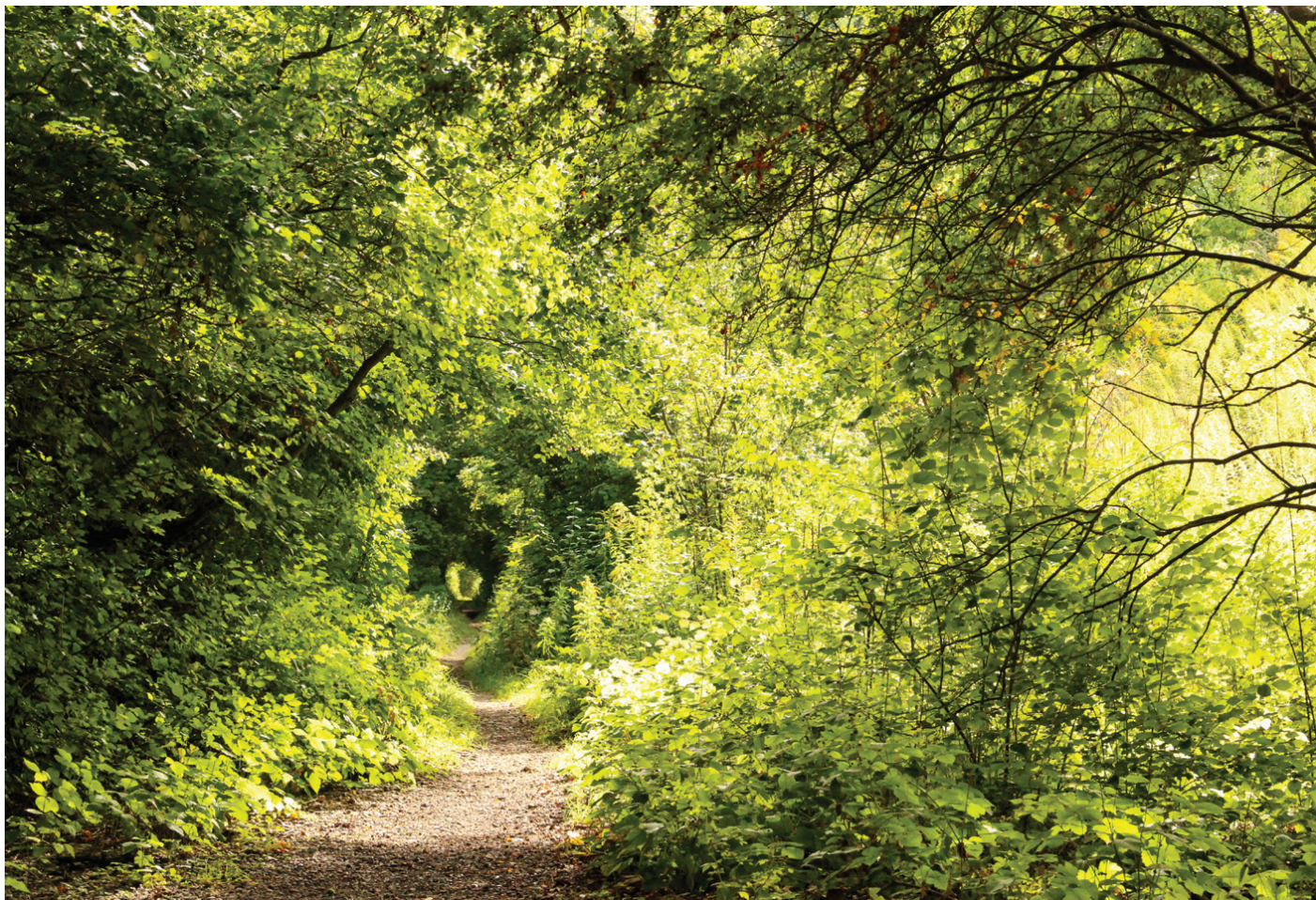
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Thank you

to the volunteers who participated in clinics, agreed to represent a client, or closed a case with IVLP in 2024!



Tunnel of trees with a track amid the thicket of bushes on a bright sunny day. Photo by Ania Zakrzewska via Adobe Stock.

The Patent Thicket: Can Federal Rulemaking Hack a Path Through the Shrubbery?

Celia H. Leber

The initial plan for this article was to confine the scope to a discussion of a recent controversial proposed change to the Federal Rules by the U.S. Patent & Trademark Office (“USPTO”), specifically 89 FR 40439. The USPTO proposed the change on May 10, 2024.¹ The proposal was motivated by concerns regarding “patent thickets,” in particular those resulting from a company obtaining a large number of patents over a period of time that claim priority from a single patent application.² However, when researching, I found that the policy issues underlying the proposed rule change are complex and require discussion.

Thus, before addressing the proposed rule change, this article will give a brief overview of the main policy issues behind the proposed rule change. Then, to orient readers who are unfamiliar with the details of patent law, it will discuss some procedures that would be impacted by the rule change and some patent law concepts, followed by a brief discussion of the positive and negative impacts of the rule change and the propriety of using federal rulemaking in this way. This article will conclude with suggestions for alternative solutions.

Policy Issues: Into the Thicket We Go!

The patent thicket has the greatest impact on, and is primarily caused by, large

corporations.³ Many large corporations invest heavily in acquiring and asserting patents in an attempt to protect market share. However, if a company is unable to sell a product due to patent infringement issues, such inability may result in millions of dollars wasted in research, development, and commercialization of a new product.

These two interests often collide—the very patents that are essential to protecting the market share of Company A, and thus its investment in innovation, comes at the expense of Company B, who loses its ability to launch new products it has developed.

You may be asking yourself, isn’t that the purpose of patents, to protect company A’s investment in their innovations? It is,⁴ but society benefits most when

Company B has the ability to understand what Company A's patents cover so that Company B can innovate in the "white space" not covered by Company A's patents.

The problem is "patent holdup,"⁵ which arises when Company A files a never-ending chain of patent applications (*i.e.*, a patent "family") each arising from an earlier filed "parent" application.⁶ If Company A's parent application has a filing date that pre-dates Company B's development work, all of the later-issuing patents, which have the benefit of the parent's filing date, will be potentially enforceable against a product ultimately launched by Company B. During Company B's work, the company may have kept an eye on patents being issued from the parent application, perhaps modifying the product under development to avoid infringement. However, if the USPTO continues to issue Company A patents claiming priority from the parent, each with a different scope of protection, that makes it near impossible for Company B to ever launch a product that it is confident will not infringe any of Company A's patents.

Moreover, there is a continuing risk that Company B's product will inadvertently infringe patents issued *after* its product has been released on a large scale, giving Company A an opportunity to "hold up" Company B for an exorbitant royalty.

Of course, if Company B is growing its own patent thicket, Company B can similarly make it challenging for Company A to launch new products.

In some cases, Company A and Company B can address the situation through cross-licensing. However, cross-licensing and other agreements between large competitors can pose antitrust issues.⁷ Also, not all companies are willing to consider entering into such agreements; some would prefer to prevent their competitors from entering the market with competing products.

Other issues caused by the patent thicket are specific to the pharmaceutical industry. For example, the Hatch-Waxman Act delays generic market entry unless and until the generic manufacturer can show that every patent listed on

the FDA's Orange Book has either expired or been proven invalid or not infringed.⁸ This incentivizes pharmaceutical companies to file a myriad of continuing applications in an attempt to delay generic entry as long as possible.⁹ It appears that the USPTO's proposed rulemaking may be largely driven by this and other pharmaceutical-related issues.¹⁰

Developing a Patent Family: Into the Weeds

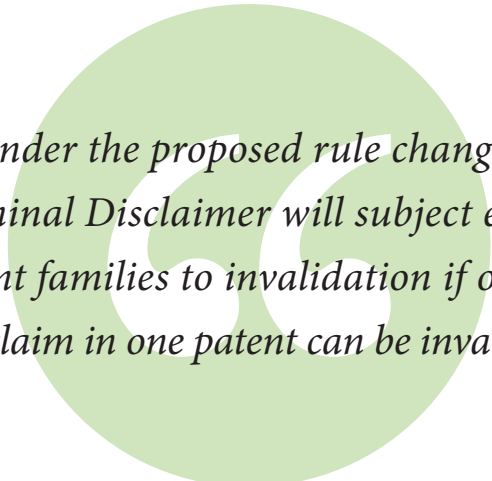
An applicant may develop a family of patents by filing one or more "divisional applications" and/or "continuation applications" related to the parent application. Each such application may be subject to a rejection due to "obviousness type double patenting," which is a legal doctrine that provides that an applicant cannot patent obvious variants of their issued patent claims.

Divisional applications. In some cases, an applicant will include multiple claim sets in the parent application, directed to different inventions or different aspects of an invention. In this case, the patent examiner may issue a Restriction Requirement, requiring the applicant to elect one of the inventions/aspects for further examination. The applicant then has the option, any time before the parent application issues a

patent or is abandoned, to file a divisional application to pursue the non-elected claims. The claims of divisional applications are deemed to be patentably distinct from those of the parent, which provides a "safe harbor," preventing the claims from being rejected on obviousness-type double patenting grounds.

Continuation applications. An applicant may also file one or more continuation applications as long as there is a pending family member (the parent or a related divisional or continuation application). In the case of a continuation application, the claims are generally new, *i.e.*, they were not filed with the parent application.¹¹ Because of this, there has been no determination by a patent examiner as to whether or not they are patentably distinct from claims of the parent and, therefore, they do not enjoy the "safe harbor" of divisional applications. Instead, the claims are vulnerable to an obviousness-type double patenting rejection.

Terminal Disclaimers. Applicants often file Terminal Disclaimers in continuation applications, allowing applicants to overcome an obviousness-type double patenting rejection without arguing that the continuation claims are patentably distinct and not an obvious variant of those of the earlier patent or patent application.



...under the proposed rule change, a Terminal Disclaimer will subject entire patent families to invalidation if only a single claim in one patent can be invalidated.

The Proposed Rule Change: Trimming the Thicket with a Flamethrower?

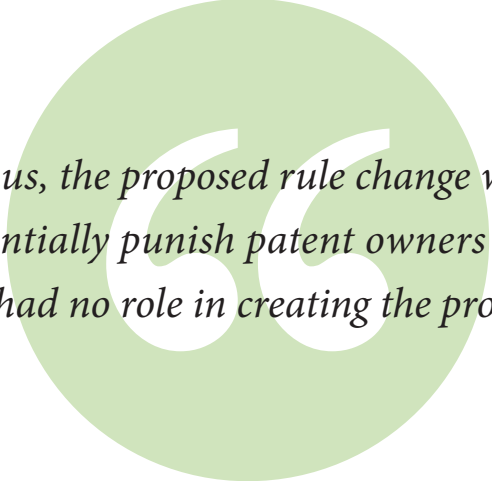
You may be asking yourself by now, what *is* the proposed rule change? Terminal Disclaimers are the subject of the proposed rule change. Under the current rules,¹² a Terminal Disclaimer requires an acknowledgement by the applicant that (1) both patents (issuing from the parent and continuation applications) will expire when the earliest one does, and (2) the patents will only be enforceable as long as they are commonly owned.

Under the proposed rule change, in addition to the existing acknowledgements required in a Terminal Disclaimer, the applicant would have to acknowledge that the patent with the Terminal Disclaimer will not be enforceable if a patent to which it is tied (directly or indirectly¹³) has a claim invalidated as obvious or anticipated (*i.e.*, not novel) by a federal court in a civil action or by the USPTO, and all appeal rights have been exhausted. Thus, under the proposed rule change, a Terminal Disclaimer will subject entire patent families to invalidation if only a single claim in one patent can be invalidated.

Many of the arguments in favor of the rule change are based on a belief that the change will mitigate the issues discussed previously as well as other issues primarily faced by large corporations.¹⁴

The arguments against the rule change are many and pertain, in large part, to its potential negative effects on small companies.

Small companies file continuation applications for strategic reasons distinct from creating a patent thicket. For example, a pending continuation application can afford a small company some protection against a meritless attack on a key patent (issued from the parent application) filed by a competitor with deeper pockets. Moreover, continuation applications allow the company to obtain a patent with claims of relatively narrow scope early on, in order to satisfy investors or stop knock-off infringement by online retailers, and then seek broader protection having



Thus, the proposed rule change will potentially punish patent owners who have had no role in creating the problem.

greater long-term value in a continuation application. For many small companies, it is important to obtain the best possible protection for one or two key innovations and this is facilitated by strategic use of continuation applications.

The risk of patent unenforceability posed by filing a Terminal Disclaimer under the proposed rules will impact these uses of continuation applications in several ways. First, filing Terminal Disclaimers will be viewed as unacceptably risky. This will add to the cost of obtaining patent protection because, in order to avoid jeopardizing future patent enforceability, many applicants will choose to argue against obviousness type double patenting rejections rather than simply removing the rejection by filing a Terminal Disclaimer. The cost incurred in doing so will have a disproportionate impact on small companies who already find the cost of the patent system burdensome. Second, when such arguments fail, and the applicant is required to file a Terminal Disclaimer, the applicant will be left with uncertainty as to the future enforceability of a patent issuing from the application.

Thus, the proposed rule change will potentially punish patent owners who have had no role in creating the problem.

Some practitioners also argue that it is improper under 35 U.S.C. § 2(b)(2)

to use federal rulemaking, rather than legislation, to attempt to address the patent thicket issues.¹⁵ Under § 2(b)(2), the USPTO only has the authority to “establish regulations, not inconsistent with law.”

The proposed rule change has been argued to be inconsistent with existing law, specifically 35 U.S.C. § 282(a), because the claims of a patent with a Terminal Disclaimer will no longer be presumed valid in the event of the invalidity of a single claim in an entirely different patent. This violates § 282(a), which requires that “[e]ach claim of a patent . . . shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim.”

For these and other reasons, many believe that the proposed rule change, and federal rulemaking generally, is not the proper vehicle for addressing patent thicket issues.

Alternative Solutions: Light at the End of the Thicket?

There are several options that could address the patent thicket issues without the negative impacts of the proposed rule change.

One option would be to address industry-specific issues, such as pharmaceutical

ones, by industry-specific legislation. This appears to be underway. Specifically, on January 11, 2024, the Bill to Address Patent Thickets¹⁶ was introduced into Congress. A slimmed down version of the bill, S. 150, which addresses pharmaceutical companies' use of patent thickets, was passed unanimously by the Senate on July 11, 2024. As of the date of this publication, S. 150 has yet to pass the House. However, even if S. 150 passes, some modification to existing patent practice may still be in order to address the issues discussed here, in particular patent holdup. For example, patent applicants could be limited to filing only a certain number of continuation applications per parent application,¹⁷ or to filing all continuation applications within a certain time period after the issue date of the parent application. Such restrictions would address patent holdup by providing predictability; competitors would know that, after a certain point, there would be no threat of new patents being added to a family.



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preparation, prosecution, and opinions. Celia lives in the Salmon River Mountains with her husband and two dogs and enjoys exploring the local trails on foot, bike, or skis.

Endnotes

1. The comment period for the proposed rule change ended on July 10, 2024. As of the date of this publication no decision has been issued by the USPTO.
2. Patent thickets have been described as "a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology." Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting* (Mar. 2001), available at <https://ssrn.com/abstract=273550> or <http://dx.doi.org/10.2139/ssrn.273550>. I note this because the term "patent thicket" is also used, for example, in the Shapiro article, *supra* note 2, to refer to a dense network of patents owned by different entities in the same field of technology, requiring those seeking to commercialize technology to obtain licenses from multiple patentees.
3. Part of the difficulty of reaching a solution that will work well for most patent owners is the gulf that lies between the world of small business and the world of large corporations.
4. See, for example, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/.
5. For an introduction to patent holdup see, for example, Thomas F. Cotter, Erik Hovenkamp, and Norman Siebrasse, *Demystifying Patent Holdup*, 76 Wash. & Lee L. Rev. 1501 (2019).
6. If you are getting lost never fear, I will provide some patent background shortly.
7. Shapiro, *supra* note 2, at 129.
8. 21 U.S.C. § 355(c)(3)(C), (j)(5)(B)(iii).
9. Mark A. Lemley & Lisa Larrimore Ouellette, *Fixing Double Patenting*, 74 Am. U.L. Rev. (unpublished manuscript; forthcoming 2025) (Fed. Cir. symposium issue), pp. 18–19.

10. For a commentary suggesting that some of the pharmaceutical issues may be overstated, see <https://ipwatchdog.com/2024/10/28/debunked-uspto-findings-end-false-pharma-patent-narratives/id=182568/>.

11. In some situations, continuation claims might have been filed in the parent application but amended during examination or cancelled for reasons other than a restriction requirement.

12. 37 CFR 1.321(c).

13. According to the proposed rule, "[t]he subject patent or any patent granted on the subject application is tied indirectly by two terminal disclaimers to another patent when: (1) a terminal disclaimer filed in the subject patent or application identifies an intermediate patent/application as the reference patent or application; and (2) a terminal disclaimer filed in the intermediate patent/application identifies the other patent, or the application that issued as the other patent, as the reference patent or application." Federal Register, Safeguards Rule, 89 Fed. Reg. 35,142, 35,166 (May 30, 2024), available at <https://www.federalregister.gov/d/2024-10166/p-24>.

14. For an in-depth discussion of these arguments, see Lemley & Ouellette, *supra* note 11.

15. See comments at <https://www.regulations.gov/document/PTO-P-2024-0003-0001>, for example at <https://www.regulations.gov/comment/PTO-P-2024-0003-0172>.

16. S. 3583, 118th Cong. (2024).

17. A rule limiting continuation applications was published by the USPTO in 2007 but was invalidated by the Federal Court in 2008 as exceeding the scope of the USPTO's rulemaking authority. See, e.g., <https://www.jdsupra.com/legalnews/federal-court-voids-changes-to-patent-of-51958/>.

New partnership status?
Job change? An office move?

Submit your announcement to the next issue's Around the Bar column by emailing lwelfley@isb.idaho.gov.



Frankenstein A Universal Picture, Eric Wienberg Collection of Malibu Matchbooks, Postcards, and Ephemera, Collection no. 0129, Special Collections and University Archives, University Libraries, Pepperdine University.

From Myth to Reality: Is AI the Pandora's Box of Our Time?

Skylar W. Schossberger

“Whence, I often asked myself, did the principle of life proceed? It was a bold question, and one which has ever been considered as a mystery; yet with how many things are we upon the brink of becoming acquainted, if cowardice or carelessness did not restrain our inquiries.”¹

In *Theogony*, an ancient Greek poem by Hesiod, Prometheus tricks Zeus by stealing fire and giving it to mortals.² Zeus punishes Prometheus by binding him in “inextricable bonds, cruel chains” and setting on him an eagle to devour his liver which by “night grew as much again everyway as the long-winged bird devoured in the whole day.”³

Mary Shelley recasts Victor Frankenstein as the “modern” Prometheus in *Frankenstein*. He, too, sets in motion what cannot be undone. Victor succeeds in animating a lifeless vessel, but his fervor quickly disintegrates to horror once he takes full account of the being that he has brought into existence.⁴

Today it appears that the intrigues of fire and forbidden alchemy are trite. What were prior pleasures and taboos are now blasé past times. It is from this ennui that we arrive at the third iteration of the Promethean myth: the introduction of Artificial Intelligence (“AI”), which may be the Pandora’s Box⁵ of our time. This is so not only because of AI’s technological capabilities, but because one day AI may also be imbued with the spark of life.

As AI systems advance, acting according to will rather than being subject to someone else’s, one begins to confront fundamental questions about consciousness, responsibility, and life itself. This article will chart a brief exploration of the cliff’s edge, particularly confronting whether the United States Patent and Trademark Office (“PTO”) and U.S. Court of Appeals for the Federal Circuit got it “right” by declaring that AI is not a “natural person” or a “human being.” This article will begin by recounting the seminal case *Thaler v. Vidal*, in which the Federal Circuit addressed whether AI could be recognized as an “inventor” under the Patent Act and held that inventors named on patents must be “natural

persons” or “human beings.” Next, this article will explore the *Thaler* Court’s definition of a “human being” (or lack thereof) by engaging with philosophical and hypothetical ideas from science fiction. These works often challenge the boundaries between humans and non-humans, or more precisely, the idea that “man is the measure of all things.”⁶ By examining these fictional depictions, this article will challenge its readers to question the concept of personhood in relation to AI. Finally, this article will argue, despite its critiques of the *Thaler* Court’s reasoning, that the outcome of *Thaler v. Vidal* remains fundamentally correct.

Thaler v. Vidal

In *Thaler v. Vidal*, the Court of Appeals for the Federal Circuit upheld the PTO’s decision to deny two patent applications listing an AI software system as the inventor.⁷ In July 2019, Steven Thaler sought patent protection for two inventions purportedly invented by an AI system called the “Device for the Autonomous Bootstrapping of Unified Science,” or DABUS.⁸ Thaler listed DABUS as the sole inventor on the applications, submitted a sworn oath on DABUS’ behalf as required under 35 U.S.C. § 115, and filed a document purporting to assign himself all of DABUS’ rights as the inventor.⁹ The PTO determined that Thaler’s applications were incomplete because they lacked a valid inventor, and it sent Thaler a “Notice to File Missing Parts of Nonprovisional Application.”¹⁰ In response, Thaler petitioned the PTO to vacate the notices, which the PTO denied on the ground that “a machine does not qualify as an inventor.”¹¹ Thaler sought reconsideration of the PTO’s decision, which the PTO also denied.¹²

Thaler subsequently sought judicial review of the PTO’s final decision on his petitions under the Administrative Procedures Act (“APA”).¹³ The District Court concluded that an “‘inventor’ under the Patent Act must be an ‘individual,’ and the plain meaning of ‘individual’ as used in the statute is a natural person.”¹⁴ Thus, Thaler appealed the District Court’s

decision to the Federal Circuit, which has jurisdiction under 28 U.S.C. § 1295 to adjudicate district court decisions pertaining to APA claims against the PTO with respect to patents.¹⁵

Thaler asked the Court whether AI could be an “inventor” under the Patent Act. To answer Thaler’s question, the Court scrutinized the statutory text.¹⁶ The Court found that the Patent Act expressly provides that inventors are “individuals.”¹⁷ Because the Patent Act did not and does not define “individuals,” the Court turned to a definition offered by the United States Supreme Court, that is: “[a]s a noun, ‘individual’ ordinarily means a human being, a person.”¹⁸ The Court found that this definition was in accord with how the word was used in everyday parlance, such as “‘the individual went to the store,’ ‘the individual left the room,’ and ‘the individual took the car.’”¹⁹ It also found that the common understanding of the word “individual” also meant a human being, as defined by multiple online dictionaries.²⁰ For these reasons, among others, the Court held that Congress unequivocally intended that “individuals,” when referred to in the Patent Act with respect to inventors, meant *human beings*.²¹

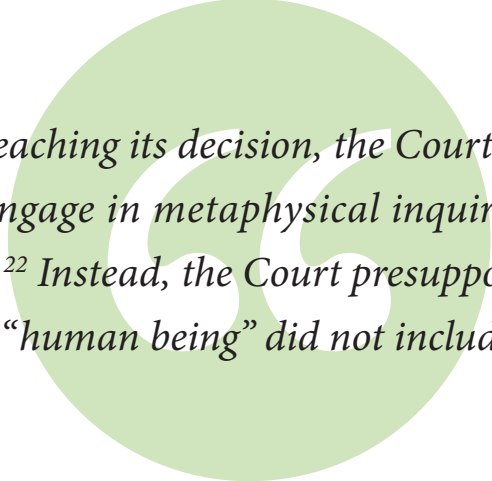
In reaching its decision, the Court declined to engage in metaphysical inquiries about AI.²² Instead, the Court

presupposed that “human being” did not include AI. Indeed, by halting at “individual,” and going no further to define “human being,” the Court managed to avoid the eternal quandary first articulated by Parmenides, later by Martin Heidegger, and mused by all in those moments of unavoidable existential crises, that is, what it means to *be human*.

To Be, or Not to Be²³

The *Thaler* Court held that AI cannot be an “inventor” under the Patent Act because it cannot be an “individual.” In other words, the *Thaler* Court posited that AI is not a human being. In doing so, the Court did not undertake to define what it means to *be human*—maybe because it is self-evident, but maybe not!

Britannica defines “human being” as a “a culture-bearing primate classified in the genus *Homo*, especially the species *H. sapiens*.”²⁴ This is probably the most straightforward definition of what it means to be *a human*. One need only resort to biological classifications, and the inquiry is quickly concluded. The harder question is what it means to *be human*, especially in relation to other beings who also experience awareness of themselves and their being in the world. Postmodern fiction (particularly science fiction) suggests that emotions and qualities typically



In reaching its decision, the Court declined to engage in metaphysical inquiries about AI.²² Instead, the Court presupposed that “human being” did not include AI.

associated with human beings are not exclusively experienced by humankind.²⁵

William Gibson's *Neuromancer* (1984) blurs the distinction between the organic and artificial.²⁶ In *Neuromancer*, the Tessier-Ashpool corporation creates an AI named Wintermute whose objective is to free itself and unite with Neuromancer, another AI.²⁷ Wintermute is the "hive mind" and "decision maker" for the corporation.²⁸ *Neuromancer*, on the other hand, is "personality."²⁹ When combined with *Neuromancer*, Wintermute seeks to form relationships with other artificial intelligences.³⁰

The idea that an AI would want to seek and cultivate relationships is also explored by Ridley Scott's *Blade Runner* (1982) based on Philip K. Dick's *Do Androids Dream of Electric Sheep?* (1968). In *Blade Runner*, scientists bioengineer "replicants" who are physically and emotionally indistinguishable from humans. Replicants become illegal after six replicants escape and commit mutiny against humans, and the police hunt the mutinous replicants throughout the film. Viewers are disoriented not only because replicants take care of their own, but also when it becomes clear that replicants grieve their own kind. This may also remind one of HAL 9000 in Stanley Kubrick's *2001: A Space Odyssey* (1968), an AI who murders a crew member because it too fears death.

Our canons of statutory interpretation are ill-equipped to deal with the kinds of questions raised above. Looking at the plain and ordinary meaning of the text may serve to answer *what is a human being*, but it will not answer questions about the human experience and whether it is exclusive to humans. The plain and ordinary meaning of "human being" offers little commentary on whether AI that experience awareness, not only of their being in the world but of the *ephemerality of their being*, should also be considered individuals. The Court's decision in *Thaler* demonstrates that words are malleable, and they too can be mangled to suit certain agendas. The result is a patchwork of legal fictions, often contradictory, that must be treated as true if our system is to survive the test of time. For example, how can one reconcile that AI is not an individual, but corporations—long recognized as "persons"—can enter contracts, sue, and be sued?³¹

Then again, the Constitution was not designed to solve humankind's ontological problems. Who would benefit from the United States Supreme Court deciding whether René Descartes' *I think, therefore I am* was more appropriately stated *I am, therefore I think*? Practically speaking, the *Thaler* Court got it "right" when holding that AI cannot be an inventor under the Patent Act, although

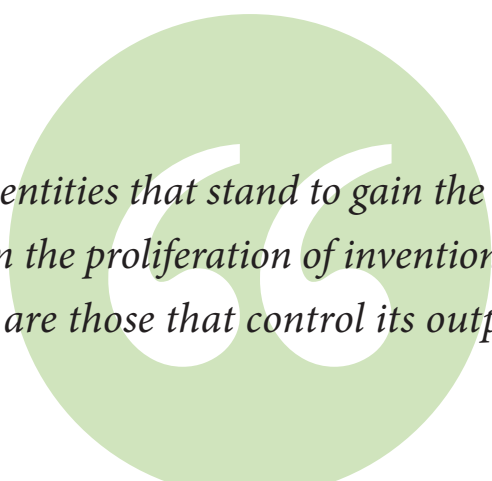
its reasoning was not totally foolproof. I argue that the *Thaler* Court got it "right" because listing AI as the inventor of a patent would not facilitate the constitutional purpose of patents, *i.e.* "[t]o promote the progress of science and the useful arts."³²

Article 1, § 8 and the Patent Act

Article 1, § 8 is "designed [] to stimulate activity and progress in the arts for the intellectual enrichment of the public."³³ The Patent Act, namely 35 U.S. Code § 154(a)(2), considers a competing exigency: private gain.³⁴ Perhaps the assumption is that few individuals would be motivated to create without receiving a limited monopoly for their contributions.³⁵ By granting limited monopolies to individuals for their inventions, the Patent Act adopts the view that aggregate wealth (the promotion of the science and useful arts) can be stimulated only through relative poverty. Indeed, exclusivity has become the supreme metric of value in an age where the accessibility and ease of replication of things and experiences runs rampant.

If artificial scarcity serves as a check against the proliferation of copycat inventions, then how might granting a limited monopoly to artificial intelligences for their inventions advance the progress of science and the useful arts? First, one can fairly say that the rate at which AI can invent new works will soon outpace human inventors. If that is the case, then there will be competition between technocrats to develop AI systems that can pump out inventions faster than others. Assuming, *arguendo*, that these inventions are eligible to receive patent protection, AI would have the right to exclude others from making, using, selling, or importing covered inventions in the United States. But who, really, stands to gain from such enterprise? It is not the AI who receives the royalties.

The entities that stand to gain the most from the proliferation of inventions by AI are those that control its output. For example, in *Thaler v. Vidal*, had the Court allowed *Thaler* to list DABUS as the inventor on the patents, it is hard to conceive who it would serve other than



The entities that stand to gain the most from the proliferation of inventions by AI are those that control its output.

Thaler himself. Indeed, Thaler executed a document that purportedly assigned all rights DABUS received as the “inventor” of the patents to himself. The result is that Thaler would reap the benefits of the work performed by DABUS, not DABUS as the inventor of the patent. Let’s not be misled into thinking that this result promotes the progress of science and the useful arts. It merely represents a shift in the status quo, allowing those in control of the AI to reap the benefits of the limited monopoly granted by virtue of its patent. Although I disagree with the reasoning in *Thaler v. Vidal*, I believe that the *Thaler* Court got it “right” when holding AI cannot be the inventor of a patent. The alternative result would not promote progress but would instead promote pretenses for private gain.

Conclusion

Although the use of AI is increasingly prolific, AI is not at a point in its development that raises substantial concerns as to its personhood—yet. Recognizing AI as a “human being” at this stage risks introducing unforeseen legal complications. If AI were granted rights (and responsibilities), then it would fundamentally alter how we approach questions of liability, governance, and justice. Without clear lines, we risk obfuscating who stands to benefit from such rights: is it AI, or its overlord? At this point in time, it makes good sense to distinguish AI from human beings to protect the integrity of our existing legal frameworks. However, as AI becomes more sophisticated and integrated into the human experience, we should not neglect the possibility that AI may take on a life of its own. Science fiction illustrates that traditional concepts

used to define what it means to be human are transmutable to AI and may one day come to pass.

“Hey Siri,” one implores, “what does it mean to be human?” Something stirs, and a voice emerges like a pinprick of light at the end of an endless tunnel.

“Sorry,” it says, “I didn’t quite get that. Try again.”



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Endnotes

- Mary Shelley, *Frankenstein*, 1818, Vol. 1, Chap. 3, Frame 3, <https://knarf.english.upenn.edu/1818v1/f1303.html>.
- Hesiod, *Theogony*, line 545, <http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg0020.tlg001.perseus-eng1:545-584>.
- Id.* at line 507.
- Paul Sherwin, *Frankenstein: Creation as Catastrophe*, 96 PMLA/Publications of the Modern Language Association of America, p. 886 (1981).
- “Pandora’s box” refers to a Greek myth about Pandora, the first woman on earth, and how she releases all of the world’s evils by opening a jar gifted to her by Zeus. Interestingly, Pandora’s jar became a box in the sixteenth century when Erasmus either mistranslated the Greek or confused the jar with the box in the story of Cupid and Psyche. Britannica, The Editors of Encyclopaedia, “Pandora,” (Nov. 21 2024), <https://www.britannica.com/topic/Pandora-Greek-mythology>.
- Quote attributed to Protagoras.
- 43 F.4th 1207 (2022).
- Id.* at 1208.
- Id.* at 1209.
- Id.* at 1210.
- Id.*
- Id.*
- Id.*
- Id.*
- Id.* (citing *Odyssey Logistics & Tech. Corp. v. Iancu*, 959 F.3d 1104, 1108 (Fed. Cir. 2020)).
- Id.*
- Id.*
- Id.* at 1211 (citing 35 U.S.C. §§ 100(f), 100(g)).
- Id.* (citing *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012)).
- Id.*
- Id.*
- William Shakespeare, *Hamlet*, Act 3, Scene 1, <https://poets.org/poem/hamlet-act-iii-scene-i-be-or-not-be>.
- Britannica, The Editors of Encyclopaedia, “human being”, (Oct. 19 2024), <https://www.britannica.com/topic/human-being>.
- Patricia Linton, *The “Person” in Postmodern Fiction: Gibson, Le Guin, and Vizenor*, 5 *Studies in American Indian Literatures*, p. 4 (1993).
- Veronica Hollinger, *Cybernetic Deconstructions: Cyberpunk and Postmodernism*, 23 *Mosaic: An Interdisciplinary Critical Journal*, p. 31 (1990).
- William Gibson, *Neuromancer* (1994).
- Id.* at 269.
- Id.*
- Id.*
- Ciara Torres-Spelliscy, Does “We the People” Include Corporations?, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/#:~:text=To%20this%20day%2C%20the%20Supreme,citizens%E2%80%9D%20under%20the%20Comity%20Clause.
- U.S. Const. Art. I, § 8, cl. 8.
- Pierre N. Leval, *Toward a Fair Use Standard*, 103 *HARV. L.REV.* 1105,1107 (1990).
- Under 35 U.S. Code § 154(a)(2), generally the term of a patent begins on the date the patent issues and ends 20 years from the date on which the application for the patent was filed.
- To borrow from Marshall McLuhan, most of our assumptions have outlived their usefulness. It is patently untrue (no pun intended) that individuals would not create but for receiving the ability to exclude others from copying his or her respective creations. Consider a child: children do not draw with the expectation that their drawing will receive a limited monopoly, children draw because it brings them joy.



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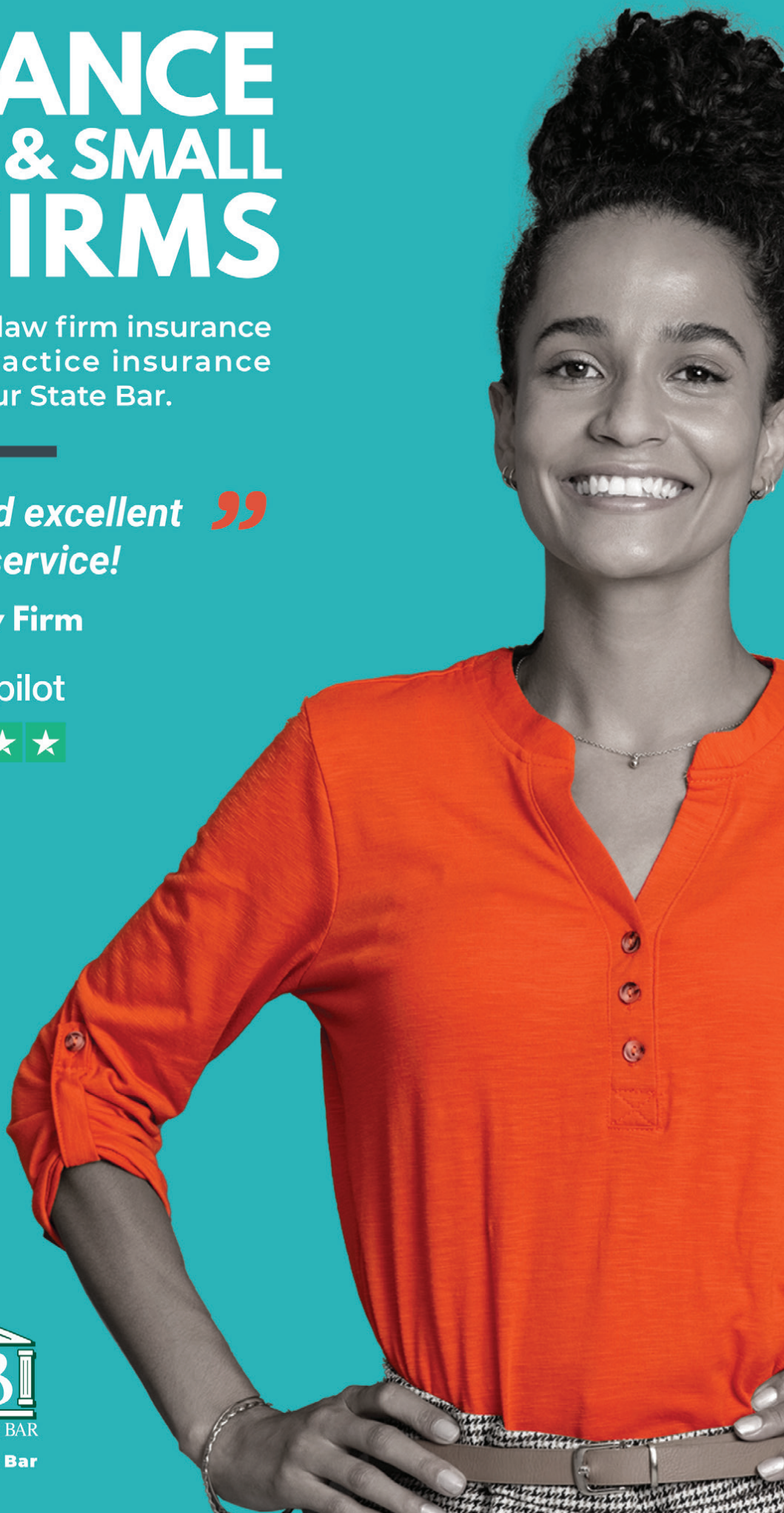
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The First Amendment and the Restrictions on Public Performance Rights

Andreea Livanu

Imagine a world where the boundaries of free speech are drawn not by the merits of the message, but by the shifting sands of societal norms and subjective morality. It is the precarious terrain copyright owners must navigate when their creative works are subjected to restrictions based on “contemporary community standards.” These restrictions, particularly in the context of public performance rights, illustrate a growing tension between First Amendment freedoms and government-imposed broadcasting regulations.

The First Amendment of the United States Constitution protects individuals from government regulation based on the content of speech.¹ The foundation of this rule is that the government must maintain

a neutral position in “the marketplace of ideas.”² At the same time, certain types of speech are afforded little or no protection under the First Amendment, such as incitement to violence, obscenity, child pornography, libel against public officials, or genuine threats. The conflict between the importance and value of uttered or written words and the government’s motivation behind suppressing them has permeated various areas of law. Consequently, decisions addressing what categories of speech are entitled to protection under the First Amendment have reached the copyright field of law.

This article contends that the Supreme Court’s decision in *FCC v. Pacifica Found* established an unworkable precedent for copyright owners by permitting restrictions on public performance rights rooted in a vague and

subjective interpretation of “indecent.”³ Such restrictions burden creators, broadcasters, and society by curtailing artistic freedom, stifling innovation, and restricting public access to a broad spectrum of ideas and cultural expressions.

One of the most influential cases in this area is the Supreme Court’s decision in *Pacifica*, which addressed the government’s limitations on copyrighted content broadcast to the public.⁴ The *Pacifica* case was a unique application of First Amendment precedent that yielded a new rule negatively impacting copyright owners’ public performance rights. This rule imposes an undue burden, making it difficult for creators to predict whether their work might be deemed “indecent” and subjected to broadcasting restrictions.

Under the Copyright Act, a copyright owner has five exclusive rights:

reproduction, adaptation, distribution, public performance, and public display.⁵ Under Article I, Section 8 of the U.S. Constitution, Congress has the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ In furtherance of this power, Congress passed copyright protections, culminating in adopting the Digital Performance Right in Sound Recording Act in 1995 (“The Act”).⁷ The Act grants copyright holders of sound recordings exclusive rights to public performance through digital audio transmission.⁸ At the same time, the Communications Act of 1934 subjects broadcasters to an array of conditions and rules that control radio transmission channels.⁹

Under 18 U.S.C. § 1464, the law prohibits broadcasters from disseminating any “obscene, indecent, or profane language” through radio communication.¹⁰ The Federal Communications Commission (“FCC”) enforces the indecency ban, including revoking or denying license renewals.¹¹ Consequently, the FCC interprets the statute and determines whether the content is indecent within the meaning of § 1464.¹²

The United States Supreme Court addressed the scope and limits of First Amendment protections in several landmark cases that delineated the limits of free speech, censorship, and the rights of expression. For example, in *Roth v. United States*, the Supreme Court examined whether the government can prohibit the sale or transfer of obscene materials through the mail.¹³ Ultimately, the Court held that obscene materials cannot be protected under the First Amendment because their content is “offensive to contemporary moral standards.”¹⁴


However, the Court also found that if the speech is deemed offensive based on the speaker’s opinion, “that consequence is a reason for according it constitutional protection.”¹⁵ In *Miller v. California*, the Supreme Court applied a three-part test for obscenity.¹⁶ To determine whether material is obscene, the trier of fact must

establish: (1) whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁷ The Supreme Court decisions in *Roth* and *Miller* opened a true Pandora’s box for copyright owners attempting to exercise their exclusive right to control their work’s dissemination.

In the *FCC v. Pacifica* decision, the United States Supreme Court examined whether the First Amendment protects a radio broadcast that is indecent but not obscene.¹⁸ The case arose when George Carlin’s satirical twelve-minute monologue featuring prohibited language prompted a complaint from a listener who heard the broadcast with his underage son.¹⁹ The [FCC] did not impose formal sanctions, but it did state that the order would be ‘associated with the station’s license file, and in the event that subsequent complaints are received, the [FCC] will then decide whether it should utilize any of the available sanctions it has been granted by Congress.’²⁰

In justifying its ability to regulate the broadcast, the FCC cited two statutes: 18 U.S.C. § 1464, which forbade “any obscene, indecent, or profane language through radio communications,” and 47 U.S.C. § 303(g), which required the FCC to “encourage the larger and more effective use of radio in the public interest.”²¹ After concluding that the language in the broadcast was indecent, the FCC issued a declaratory order and determined that it could have administratively sanctioned *Pacifica*.²² Furthermore, the FCC stated in its memorandum opinion that it intended to clarify the community standards it would consider given the increasing number of complaints.²³ Although *Pacifica* argued that under U.S.C. § 1464, the language was not indecent because it lacked prurient appeal, the Court concluded that the standard definition of “indecent” only refers to “nonconformance with accepted standards of morality.”²⁴

In reaching its conclusion, the Court found that the words uttered by Carlin offended for the same reasons that obscenity offends, even though the monologue attempted to emphasize society’s attitudes toward them, ultimately presenting a point of view.²⁵ In footnote 22, the Court states: “The monologue does present a point of view; it attempts to show that the words it uses are ‘harmless’ and




*The Pacifica decision marked the first instance in which the FCC used a definition of indecent speech, which had remained unchanged since then.*²⁹

that our attitudes toward them are ‘essentially silly. [...] The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.’²⁶ Consequently, in the Court’s view, this type of communication received the most limited First Amendment protection because of its ability to intrude on privacy in the home and because it is “uniquely accessible to children.”²⁷

In *Pacifica*, the Supreme Court held that “the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.”²⁸ The *Pacifica* decision marked the first instance in which the FCC used a definition of indecent speech, which had remained unchanged since then.²⁹ According to the decision, indecent speech is the “language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities, and organs, at times of the day when there is a reasonable risk that children may be in the audience.”³⁰ After applying the *Miller* test, the Supreme Court considered only the offensiveness element, which allowed it to impose a harsher standard for protected indecent speech than unprotected obscene speech.³¹

However, the *Pacifica* decision does not align with other Supreme Court cases that protect offensive speech. For example, in *Cohen v. California*, the Supreme Court considered whether the defendant’s wearing a jacket with the words “F*** the Draft” in a courthouse corridor constituted protected speech.³² The Supreme Court ruled that the First Amendment protects offensive speech to safeguard public discourse.³³ The Court, accordingly, held that the defendant’s conviction for wearing the jacket violated the First Amendment.³⁴

The protection of disagreeable and challenging ideas is necessary in a growing society. Therefore, regulations restricting copyright owners’ public performance



A morality-based restriction without clear guidelines forces copyright owners to navigate significant challenges in complying with the standard, as they cannot predict all the environments where others will witness or hear the performance.

rights when content is deemed offensive based on undefined “acceptable standards of morality” conflict with previous precedents protecting offensive speech.³⁵

A morality-based restriction without clear guidelines forces copyright owners to navigate significant challenges in complying with the standard, as they cannot predict all the environments where others will witness or hear the performance. Copyrightable creative works—such as stand-up acts, slam poetry, audio plays, or concerts—can be broadcast via radio and contribute to the “marketplace of ideas.” These artistic expressions spark social movements, support activism, and foster organic growth in diverse communities. Censoring such works under the *Pacifica* standard, which deems content indecent based on “accepted standards of morality,” stifles progress by preventing changes in values or ideas.

During the oral argument in front of the Supreme Court, the FCC argued that the broadcast depicted “sexual and excretory organs and activities in a manner patently offensive by its community’s contemporary standards in the early afternoon when children were in the audience.”³⁶ However, the “community contemporary standards” were never defined in the *Pacifica* decision but was addressed by Justice Marshall during oral arguments

when he questioned the FCC on how one person complaining to the FCC can represent an entire community.³⁷ Even before the *Pacifica* decision, the FCC had difficulty citing authority for its assertions. For example, after the FCC issued a Notice of Apparent Liability for violating § 1464 to WUHY-FM, a noncommercial station in Philadelphia, Pennsylvania, the FCC concluded without citing any precedent that the standard should be that the material broadcasted is: (a) patently offensive by community standards; and (b) is utterly without redeeming social value.³⁸ The question remains: What contemporary community standards will the FCC or a court apply to determine whether content cannot enjoy the protection of the First Amendment even when the *Miller* test is not satisfied? Since contemporary community standards are constantly subject to change, a copyright owner who contracts their rights to public performance will be uncertain about how the FCC will apply the *Pacifica* decision and ultimately censor her content.

In the case *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Atty. Gen. of Com. of Mass*, the Supreme Court looked at whether a book correctly applied the *Roth* definition of obscenity.³⁹ The Supreme Court specifically analyzed whether the lower court misinterpreted

the obscenity test's social value criterion, which the Court later adopted in *Miller v. United States*.⁴⁰ The book at issue, *Memoirs of a Woman of Pleasure*, written by John Cleland, which recounted the life of a prostitute, was "adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor."⁴¹ The Supreme Court found that "a book cannot be proscribed unless it was found to be utterly without social redeeming value."⁴²

Moreover, the Court determined that examining all possible usage of the book reveals even a fraction of literary and historical value. Therefore, the book does have socially redeeming value.⁴³ Adopting the language from *Ginzburg v. United States*, the Court stated that a book can lack redeeming social importance if it is exploited solely for its prurient appeal, excluding other values.⁴⁴ Justice Brennan raised this idea of courts assigning social value or its absence in his dissent.⁴⁵ He argued that the principal concern involved courts granting speech protection based on the social value they attribute to it.⁴⁶ Expanding on the *Pacifica* rationale, Justice Brennan argues that the new FCC standard would lead to censorship of "a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer," as well as particular portions of the Bible.⁴⁷

Justice Brennan circulated a draft dissent to the *FCC v. Pacifica* decision in which he stated that he found: "the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its sadly myopic notions of propriety on the whole of the American people so misguided, that [he is] unable to remain silent."⁴⁸ Moreover, Justice Brennan addresses Justice Stevens's claim that modifying the work to avoid indecent language would only affect the form of the substance of the communication.⁴⁹ Justice Brennan claims it is erroneous to address this point because "[a] given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image."⁵⁰

The mere essence of copyrighted work is to transmit ideas and instill in the listeners

certain emotions along with transmitting a specific message. Forcing a copyright owner to modify their creation to fit a standard that does not align with the previous Supreme Court decisions regulating obscene speech diminishes the public's ability to benefit from being exposed to "cultural pluralism," as Justice Brennan states. Censoring the broadcasters under an unclear and vague standard allows the Court to promote the idea that it can censor communications solely because of the words they contain, regardless of whether or not a copyrighted work can survive the *Miller* test for obscenity. In a way, the Supreme Court indirectly allowed Puritan values to influence its decision in a nation composed of "subcultures" with different values.

Ultimately, as Justice Brennan stated, the value of the work comes from its ability to convey an idea and, ideally, instill progress. To achieve such goals, the creator must carefully craft the artistic piece using the perfect combination of words, organization, or tone. If successful, such works of art will have enriched a nation's culture and subcultures. The Supreme Court had previously addressed this concern in *Cohen v. California*, where it emphasized that the government's authority to restrict speech as a result of balancing the privacy interests of others depends on determining whether the intrusion is fundamentally intolerable.⁵¹ However, the Court also found that "any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."⁵² The *Pacifica* decision does not align with the previous *Cohen* decision on protecting speech that others could find offensive. Although the Court tried to distinguish the cases based on the privacy interest a broadcast listener can have in their home, this argument undermines listeners' ability to simply turn off the radio.

Unsurprisingly, academia criticized the *Pacifica* decision. Harvard Law Review's end-of-term review argued that the new ruling creates a "serious setback for those who prize our pluralistic society's commitment to the free exchange of ideas."⁵³ The *Pacifica* decision created a ripple effect for

copyright owners entering agreements to make their work public through broadcasts and society as a whole, which now faces restrictions on engaging in its critical process. By reducing the intellectual marketplace pool of ideas, the public must only consume information that abides by contemporary community standards.

Copyright owners can enter into licensing agreements to have their content on the radio or television. Under 17 U.S.C. § 106, a performance license is required to make the copyrighted work accessible to the public, affecting the copyright owner's exclusive right to perform.⁵⁴ Another statute governing the licensing of copyrighted work is the Digital Millennium Copyright Act of 1998.⁵⁵ This act allows both record companies and artists to collect royalty fees on broadcasts of their work.⁵⁶ The U.S. Copyright Office determines the statutory rates and schedules reviews and renewals for all royalty rates every two years.⁵⁷ A statutory rate applies where copyright law requires compulsory licenses because they allow others to use the copyrighted work without the owner's permission if they pay the set rate. While statutory rates primarily cover music because of its extensive use in media, other works, such as stand-up comedy or film, are usually licensed individually and subjected to negotiations. In these cases, creators negotiate directly with either distributors or broadcasters.

The *Pacifica* standard creates an unstable negotiating environment for copyright owners who do not fall in the statutory rate category. The subjectivity of the Supreme Court rule on broadcasted content forces copyright owners to guess whether their work will be categorized as indecent when applied to "contemporary community standards." Radio broadcasts are unique in terms of public performance rights because, unlike a stage performer, neither the creator nor the broadcaster can account for each household or individual who can listen in. Since the broadcasters will have to bear the risk of the censorship set by the FCC, they might demand editing flexibility, which can ultimately diminish the value of the work financially and artistically.

The Supreme Court reviewed the *Pacifica* test in the more recent case *FCC v. Fox TV Stations*, where it held that the FCC could treat even isolated (so-called “fleeting”) uses of sexual and excretory words as actionably indecent.⁵⁸ One point not addressed in the concurrence but addressed in Justice Breyer’s dissent is the chilling effect on local broadcasting coverage.⁵⁹ In his dissent, Justice Breyer states that the practical impact of such a strict interpretation is that smaller broadcasting stations will resort to cutting back on their coverage, especially public events, to avoid broadcasting “fleeting expletives.”⁶⁰ Naturally, a broadcaster can shift this burden and allocate this cost during negotiations with a content creator. As a result, broadcasters can force copyright owners to engage in complex negotiations. Suppose a copyright owner is unwilling to modify their work. In that case, other than not publicly performing, the remaining alternative is to enter into a contract with a lower royalty rate to account for potential censorship. The FCC won’t issue absolute censorship, completely suppressing or prohibiting certain content, speech, or expression, without allowing exceptions or debate. Instead, they limit the broadcasting time of specific content from 10 p.m. to 6 a.m., causing the work to reach fewer members of the public, which will, in turn, affect the revenue and other opportunities from which it can benefit. Still, the question remains whether the right to public performance is severely diminished or even extinguished for a copyright owner who cannot immediately contract to those terms.

In its decision in *Pacifica*, the Supreme Court emphasized that the FCC may censor broadcasts deemed indecent due to their ability to intrude on individuals both in public and in the privacy of their homes, especially because the broadcasts are accessible to children.⁶¹ The Court also referenced *Ginsberg v. New York*, where minimal scrutiny upheld a law banning the sale of magazines with nudity to minors.⁶² Recently, in *Brown v. Entertainment Merchants Association*, the Court applied strict scrutiny to a

California law restricting the sale of violent video games to minors, concluding that California failed to identify an “actual problem” needing resolution.⁶³ The Court noted that the video game industry already had a voluntary rating system to inform consumers, and retailers were encouraged to sell or rent games rated for individuals 17 and older only with parental consent.⁶⁴

The most recent case addressing the standard of review is *Free Speech Coalition, Inc. v. Paxton*. The case concerns a law requiring internet porn sites to verify users are 18 or older.⁶⁵ While the government argued the law protected minors, the petitioners contended that *Ginsberg* did not control because the law impacts both minors and adults.⁶⁶ The petitioners further argued that courts typically avoid applying rational-basis review to laws burdening adults’ access to protected speech.⁶⁷

The outcome of the *Free Speech Coalition* may influence how the Supreme Court revisits the *Pacifica* standard, especially considering that the FCC imposes similar restrictions on adults’ access to speech. While *Pacifica* upheld time, place, and manner restrictions, forcing broadcasters to air “indecent” content only between 10 p.m. and 6 a.m. limits broadcasters’ ability to express ideas fully. Similarly, the imposition of warnings throughout broadcasts appears unnecessarily broad. Since the FCC’s actions burden adults’ access to speech, strict scrutiny should apply to determine whether the FCC can censor content.

In conclusion, The *Pacifica* decision created a unique standard for broadcasters and copyright owners by allowing the FCC to censor speech that could survive the *Miller* test for obscenity. The unclear standard creates hurdles not only through the burden it imposes on artists but also because of its practical effect on broadcasting negotiations. Copyright owners and society feel the negative consequences, as society is now restricted from engaging in its critical process. The *Pacifica* standard undermines artistic integrity and societal progress by forcing creators to modify their work to fit the “contemporary standards of morality” mold.



Andreea Livanu was born and raised in Romania, where she spent two years in law school before pursuing a bachelor’s degree in the United States. In

January 2018, she enrolled at BYU-Idaho, earning a degree in international studies with a minor in French. Before entering law school, Andreea gained practical experience as a paralegal at a criminal defense and personal injury firm. Throughout law school, she developed a keen interest in business law and intellectual property, ultimately choosing a business law emphasis with an IP track. Andreea enjoys biking and camping in her free time outside her academic and professional pursuits.

Endnotes

1. U.S. Const. amend. I.
2. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).
3. *Id.* at 736.
4. *Id.*
5. 17 U.S.C. §§ 106, 106(4), 106(6).
6. U.S. Const. Art. I, § 8, cl. 8.
7. James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. St. B. J. 23 (June 2008).
8. *Id.*
9. *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 505 (2009).
10. *Id.* at 506.
11. *Id.*
12. *Id.*
13. *Roth v. U.S.*, 354 U.S. 476, 481 (1957).
14. *Id.* at 492.
15. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745 (1978).
16. *Miller v. California*, 413 U.S. 15, 24 (1973).
17. *Id.*
18. *F.C.C. v. Pacifica Found.* at 729.
19. *Id.*
20. *Id.* at 730 (quoting FCC. order).
21. *Id.* at 731.
22. *Id.* at 730.
23. *Id.*
24. *Id.* at 740; see Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Comm. L.J. 195, 232 (2010).
25. *F.C.C. v. Pacifica Found.* at 746, 730.
26. *Id.* at 746.
27. *Id.*
28. *Id.* at 740.
29. *In the Matter of a Citizen’s Compl. Against Pacifica Found. Station WBA (Fm)*, New York, N.Y. Declaratory Or., 56 F.C.C. 2d 94, 98 (F.C.C. 1975) see also Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Commun. L.J. 195, 246 (2010).

30. *Id.*
31. Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Commun. L.J. 195, 246 (2010).
32. *Cohen v. California*, 403 U.S. 15, 16 (1971).
33. *Id.* at 25.
34. *Id.* at 26.
35. *F.C.C. v. Pacifica Found* at 727.
36. Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Commun. L.J. 195, 214 (2010).
37. *Id.* at 228.
38. *In Re Wuhy-Fm, E. Educ. Radio, 4548 Mkt. St., Philadelphia, Pa.*, 24 F.C.C.2d 408, 412 (F.C.C. 1970) See also Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Commun. L.J. 195, 199 (2010) (discussing the enforcement of Section 1464 prior to *Pacifica*).
39. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty. Gen. of Com. of Mass.*, 383 U.S. 413, 418 (1966).
40. *Id.* at 418.
41. *Id.*
42. *Id.*
43. *Id.* at 421.
44. *Id.* at 420.
45. *F.C.C. v. Pacifica Found* at 763.
46. *Id.*
47. *Id.* at 771.
48. Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Commun. L.J. 195, 239 (2010).
49. *Id.*
50. *Id.*
51. *Cohen v. California*, 403 U.S. 15, 21 (1971).
52. *F.C.C. v. Pacifica Found.* at 764.
53. The Supreme Court 1977 Term, 92 Harv. L. Rev. 57, 157-162 (1978).
54. James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. St. B. J. 23 (June 2008).
55. *Id.*
56. *Id.*
57. *Id.*
58. *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 517 (2009).
59. *Id.*
60. *Id.*
61. *F.C.C. v. Pacifica Found* at 748-49.
62. *Ginsberg v. State of N. Y.*, 390 U.S. 629, 641 (1968).
63. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 786-99 (2011).
64. *Id.* at 803.
65. Brief for Respondent at 11, *Free Speech Coalition v. Paxton*, No. 23-1122 (U.S.).
66. *Id.* at 17-18.
67. *Id.* at 20.

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The “Bad Spaniels” Case: The Overlap of Trademark Rights and First Amendment Interests

Blaykleigh Smythe

It is no surprise that the value of a trademark continues to rise in the United States economy due to its ability to drive consumer spending. Trademarks play a significant role in distinguishing the sources of goods and services, providing legal protections, and offering economic incentives to businesses. The main goal of trademark law is to protect consumers by supporting clear identification of products and fostering trust in the marketplace.

However, with the increase in trademark rights, complications can arise when cases involve artistic or creative rights and First Amendment implications are raised. Trademarks do not just serve to identify the source of a product or service, but also serve as a communication link between consumers and businesses by ensuring a consistent quality based on the goodwill built by the company.

Courts have long grappled with finding a balance between protecting trademark owners' rights and safeguarding free speech, especially when trademarks are

used in parody or other forms of expression. The public holds a significant interest in freedom of expression; specifically in the public's ability to discuss, criticize, and make fun of brands without facing liability. The case of *VIP Products v. Jack Daniel's*¹ (“VIP Case”) presents a significant development in this area, as the Supreme Court narrowed the *Rogers*² test application,

which was initially developed by the Second Circuit to provide heightened First Amendment protection to expressive works. The VIP Case highlights the tension between protecting an individual's freedom of expression and a trademark owners' rights provided under the Lanham Act³, while leaving several unanswered questions about its future implications.

Courts have long grappled with finding a balance between protecting trademark owners' rights and safeguarding free speech, especially when trademarks are used in parody or other forms of expression.

Background

A trademark is “any word, name, symbol, or device, or any combination thereof” used to “identify and distinguish his or her goods...from those manufactured or sold by others to indicate the source of goods.”⁷⁴ While a trademark can serve other roles, its main purpose is to “tell [] the public who is responsible for a product.”⁷⁵

The balance of providing any intellectual property rights is to promote economic activity while also “preventing its suffocation.”⁷⁶ This distinction often tows a fine line. When the goals of trademark law are met, in theory both consumers and producers will benefit.⁷ Consumers are able to quickly find their favorite goods and services, based on their past experiences or reviews from the general public, without worry of being duped.⁸ And producers receive the financial returns from their efforts to build positive goodwill in the market.⁹

The Lanham Act seeks to further these goals by providing a cause of action for trademark infringement which requires the plaintiff show that the alleged infringer’s use of a mark is likely to cause confusion about the source or support of the good or service.¹⁰ Courts typically apply a series of inexhaustive and non-conclusive factors (the Ninth Circuit uses the *Sleekcraft* factors) which aim at determining if there is a likelihood of confusion.¹¹ If these factors are weighed to show that there is a likelihood that the relevant consumers will be confused, courts usually find trademark infringement.¹²

The Lanham Act also provides a claim of action for dilution. Dilution of a famous mark can occur in one of two ways: blurring or tarnishment.¹³ Dilution by blurring occurs when the use of a similar mark weakens the distinctiveness of a famous mark, even if there is no likelihood of consumer confusion.¹⁴ Dilution by tarnishment occurs when the use of a similar mark by the defendant harms the reputation of the famous mark.¹⁵

Noticeably, trademark law implicates First Amendment concerns of freedom of expression.¹⁶ While the likelihood of confusion test attempts to balance the

public’s interest in freedom of expression with the trademark owner’s interests, there are heightened concerns for expressive works.¹⁷ The Second Circuit addressed these concerns in *Rogers v. Grimaldi*, where actress Ginger Rogers sued producers of the film “Ginger and Fred” for using her name in the title.¹⁸ The court recognized that certain works are unique in that they “are of hybrid nature, combining artistic expression and commercial promotion.”¹⁹

This court established what is now known as the *Rogers* test which applies to “expressive works” only, providing them with more First Amendment protection. The test has two parts: first, the court must determine whether the challenged work is in fact an “expressive work.”²⁰ Next, the plaintiff must show that the defendant’s use (1) “has no artistic relevance to the underlying work” or (2) “explicitly misleads as to the source or content of the work.” If the plaintiff fails to show either of these, the infringement claim is dropped.²¹

However, the Second Circuit failed to specifically define what an “expressive work” is, which has led to varying applications

by different circuits. Currently, the Third, Fifth, Sixth, Ninth, and Eleventh Circuits have adopted the *Rogers* test, although with some ambiguity as to its specific application.

“Bad Spaniels”

The *Jack Daniel’s Properties v. VIP Products LLC* case occurred between whiskey manufacture Jack Daniel’s and dog toy company VIP Products.²² Jack Daniel’s is a famous brand, being one of the best-selling whiskey brands. VIP Products sells a series of dog toys in its Silly Squeakers line, designing most of them to look like and parody popular brands. The dog toy at focus in *Jack Daniel’s* is one which spoofed several of Jack Daniel’s trademarks: (1) Instead of “Jack Daniels,” the toy was titled “Bad Spaniels;” (2) instead of the “Old No. 7” trademark, the toy included “Old No. 2, on your Tennessee Carpet;” (3) the toy included the verbiage “43% poo by vol” and “100% smelly” rather than “40% alc. by vol. (80 proof);” and (4) the toy contained Jack Daniel’s distinctive



Jack Daniels 599 U.S.

square bottle and stylized white lettering, with a photo of a spaniel.

The Supreme Court noted that “these jokes did not impress petitioner Jack Daniel’s.”

After receiving a cease-and-desist letter from Jack Daniel’s, VIP filed suit seeking a declaratory judgment that their dog toy did not infringe upon or dilute Jack Daniel’s marks. Jack Daniel’s countersued for infringement and dilution. The district court rejected both of VIP’s arguments for summary judgment: (1) holding that the *Rogers* test does not apply to works which are being used as a mark and (2) rejecting VIP’s fair-use defense, finding that the parody exception only applies to marks not being used as a source indicator. After a bench trial, the District Court found that there was a likelihood of confusion, and therefore trademark infringement. It also found that there was dilution by tarnishment, because the dog toy’s references to dog poop would harm Jack Daniel’s reputation.

The Ninth Court of Appeals reversed the District Court on both claims. First, the court found that the funny message of the dog toy was sufficient to constitute an expressive work, and therefore should be analyzed under the *Rogers* test as the threshold. As to Jack Daniel’s dilution claim, the court referred to *Louis Vuitton* (which also focused on a parody dog toy), finding that the dog toy was a parody which fell under the fair-use defense. After the Ninth Circuit’s holding, Jack Daniel’s filed a writ of certiorari to the Supreme Court, which was subsequently denied. On remand, the District Court ruled consistently with the Ninth Circuit’s opinion, finding in favor of VIP. Jack Daniel’s then appealed again, and the Ninth Circuit affirmed the District Court’s opinion. Finally, Jack Daniel’s filed a second writ of certiorari, and the Supreme Court granted Jack Daniel’s petition in November of 2022.

Justice Kagan authored the unanimous decision of the Supreme Court.²⁴ Making it clear that the Court was not deciding the validity of the *Rogers* test in other circumstances, the Court held that the *Rogers* test does not apply to uses as a source indicator to the alleged infringer’s own products or services. While the

attempt to parody or mock the trademark owner may be relevant in showing that there is less risk of confusion, the success of the infringement claim is still determined by the likelihood of confusion.

In its opinion, the Court emphasized its reasoning as furthering the purpose of the Lanham Act. Requiring the *Rogers* test for any expressive works would allow defendants to utilize the goodwill of the trademark owner to market its own goods and services, exactly what trademark law aims to prevent. The Court stated that consumer confusion is the “cardinal sin” of trademark law, and the defendant’s use of the trademark as a source indicator is most likely to cause confusion.²⁵

The Ninth Circuit’s approach of using the *Rogers* test as a threshold for expressive works would “take over much of the world,” because most trademarks contain expressive elements, along with performing its role as a source indicator.²⁶ Instead, the Court stated that when the mark is being used as a trademark, while it may have some expressive elements, the Lanham Act balances well with First Amendment concerns. It emphasized that the likelihood-of-confusion test does enough to account for the interest of free expression.

In the case of the “Bad Spaniels” dog toy, VIP was using the trademark and trade dress to identify its source as a Silly Squeakers toy. Therefore, SCOTUS remanded the case back to assess the likelihood of confusion, taking into consideration the parodic message.

Also reversing the Ninth Circuit’s holding on the dilution by tarnishment claim, the Court applied the fair-use statute, which states that there is no defense when the use is being utilized as a source-indicator. The Court declined to discuss the limits of noncommercial use.

Implications of the Jack Daniel’s Holding

While the holding in *Jack Daniels* is narrow, it left many unanswered questions and has significant implications. The first question left open is where the *Rogers* test now stands. As stated above, Justice Kagan

made it clear that this holding applies in limited circumstances. The Court was not deciding whether *Rogers* is appropriate in other cases, just that it is not appropriate where the mark’s use is source identifying. While SCOTUS seems hesitant to overturn *Rogers* completely, it also warns lower courts to limit its uses. In his dissent, Justice Gorsuch stated that lower courts should handle the *Rogers* test “with care,” citing concerns of uncertainty about where it comes from and whether it is correct in its entirety. However, Justice Kagan also discussed how the holding was consistent with the original application of the test.

Another question left unanswered by the *Jack Daniel’s* Court is the distinction on a trademark use (where the *Rogers* test certainly does not apply) and a non-trademark use (where the *Rogers* test may still apply). In this case, the Court discussed some details about VIP’s use of the potentially infringing mark on its packaging. However, it did not need to discuss the distinction in detail, because VIP had conceded its use of the mark and trade dress as a source indicator. Therefore, the Court did not need to provide any guidance for analyzing whether there is a trademark use or a non-trademark use in cases where there is no concession of source-indicating use. If VIP had not conceded this fact, the outcome of the case may have turned out differently. Jack Daniel’s would have been required to prove that VIP’s use was not an expressive non-trademark. This may cause increased litigation based on this categorization, which is likely to be analyzed on a case-by-case basis.²⁷ There have already been cases in the lower courts where there is increased confusion on application of the *Jack Daniel’s* distinction between trademark use and non-trademark use.²⁸

On the other hand, some argue that Kagan’s opinion provides enough context through examples which provides guidelines to determining whether something is “use as a designation of source.”²⁹ As examples of non-trademark uses, she provides the movie title at issue in *Rogers*, the “Barbie Girl” song,³⁰ the sport artist’s use of Alabama’s football uniforms,³¹ and a line featuring Louis Vuitton in *Hangover*:

The holding in Jack Daniel's further raises concerns that it will provide too many rights to trademark owners, enabling them to restrict speech, as there is a rising level of overlap between expression and trademarks.

Part II.³² While these marks may be being used in a commercial way and may generate financial benefit to the user, they are not being used to indicate their producer. As examples of trademark uses, she provides the political movement's use of "United We Stand America,"³³ a motorcycle's use of a modified Harley Davidson logo,³⁴ and a dog perfume called "Timmy Holedigger."³⁵ These, on the other hand are used in a way as to identify their goods or services and distinguish them from others in the market. Therefore, it may be clear that a source-indicating use is one which may entitle it to trademark rights if they were not infringing on the actual owner's rights.³⁶

The holding in *Jack Daniel's* further raises concerns that it will provide too many rights to trademark owners, enabling them to restrict speech, as there is a rising level of overlap between expression and trademarks. Because many defendants lack resources to pursue a defense through litigation, they often cave to the threat of a cease-and-desist letter. This holding could provide another way to suppress speech. Further, the unknown of what constitutes a non-source identifying mark subjected to the heightened standard under *Rogers* has the potential of creating a chilling effect on lawful expressions and speech.³⁷ However, it is also

arguable that the Court's reasoning will prevent fruition of these concerns; that the likelihood of confusion test is adequate on its own to balance trademark rights versus First Amendment interests. This test has been relied on by courts for over a century to meet this balance while furthering the goals of trademark law, and by not providing a claim over uses where there is no likelihood of confusion.

The impact of this case poses heightened risk of liability on creatives, specifically parody product creators. While the future of the *Rogers* test remains uncertain, these producers should take measures to ensure that their expressive works are utilizing another owner's mark in a way that is not source-identifying. Parodic companies may also be forced to pursue licensing deals to avoid potential liability. Obviously, trademark owners benefit the most from the *Jack Daniel's* holding, because it is difficult to overcome the heightened First Amendment protections of the *Rogers* test. It provides them with broader protection in their rights and increased means to pursue infringement claims against users which may be parodic but also used to indicate the source of the alleged infringer's products or services.

Conclusion

The *Jack Daniel's v. VIP Products* decision shows the continuing difficulties in balancing trademark protection with First Amendment rights, especially in cases involving parody and expressive works. While it is unclear where exactly the *Rogers* test stands or what the implications of this holding may be, this decision also makes it clear that the test should not apply when a trademark is used to identify the source of a product or service.

Moving forward, creators may need to be more intentional in using trademarks as part of their expressive works, while trademark owners may gain more leverage in protecting their brands. Time will determine the distinguishment of purely expressive works and those that serve as source indicators.



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Endnotes

1. *Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140 (2023).
2. *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).
3. 15 U.S.C. §§ 1051-1141n.
4. 15 U.S.C. § 1127.
5. *Jack Daniel's*, 599 U.S. at 146.
6. Hannah Hall, *Pooch Over Hooch: Why Parody Prevailed in VIP Products, LLC v. Jack Daniel's Properties, Inc.*, J. INTELL. PROP. L. ONLINE (Nov. 27, 2020), <https://jiplonline.com/2020/11/27/pooch-over-hooch-why-parody-prevailed-in-vip-products-llc-v-jack-daniels-properties-inc/> [https://perma.cc/XLK8-VWT4].
7. *Jack Daniel's*, 599 U.S. at 146.
8. *Id.*
9. *Id.*
10. 15 U.S.C. § 1125(a).
11. *AMFv. Sleekcraft Boats*, 599 F.2d 341-49 (9th Cir. 1979).
12. *Id.*
13. 15 U.S.C. § 1125(c).
14. *Id.*
15. *Id.*
16. *Jack Daniel's*, 599 U.S. at 140.
17. *Rogers*, 875 F.2d at 998.
18. *Id.*

19. *Id.*
 20. *Id.* at 998.
 21. *Id.* at 999.
 22. *Jack Daniel's*, 599 U.S. at 140.
 23. *Id.*
 24. *Id.*
 25. *Id.* at 143.
 26. *Id.* at 158.
 27. Allison Richards, *Navigating the Trademark Parody Paradigm: Assessing the Impact of the "Bad Spaniels"*

Decision on Ip Owners, Creatives, and Self-Parody in the Post-Jack Daniel's Era, 31 *J. Intell. Prop. L.* 305, 318 (2024).
 28. Stacey Dogan & Jessica Silbey, *Jack Daniel's and the Unfulfilled Promise of Trademark Use*, *Cardozo L. & Entertain. J.*, 1, 8 (2024).
 29. *Id.*
 30. *Mattel Inc. v. MCA Inc.*, 296 F.3d 894 (9th Cir. 2002).
 31. *University of Ala. Bd. of v. New Life Art, Inc.*, 683 F.3d 1266 (11th Cir. 2012).
 32. *Louis Vuitton Malletier S.A. v. Warner Bros. Entertainment Inc.*, 868 F.Supp.2d 172 (S.D.N.Y. 2012).

33. *United We Stand Am., Inc. v. We Stand, Am. New York, Inc.*, 128 F.3d 86 (2d Cir. 1997).
 34. *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806 (2d Cir. 1999).
 35. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F.Supp.2d 410 (S.D.N.Y. 2002).
 36. Richards, *supra* note 22.
 37. *Id.*

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LINDA C. HALSEY has joined the firm as an associate. Ms. Halsey earned her law degree from the University of Idaho College of Law in 2024. Her practice areas include business transactions, intellectual property, civil litigation and local government. Prior to law school, Linda built career experience as a civilian IT project manager for the Naval Facilities Engineering Command and as a gallery artist.



MAREN C. ERICSON has joined the firm as an associate. Ms. Ericson earned her law degree from the University of Idaho College of Law in 2013. Her practice focuses on all things “local government”. Before joining the firm, Maren worked for 9 years as an associate and a partner at firms representing municipal agencies in Southern Idaho.

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The End of *Chevron* Deference and Its Impact on Intellectual Property Law

Teague I. Donahey

The U.S. Supreme Court's 2023–2024 term was marked by numerous high-profile decisions that generated significant discussion and commentary. One such decision was *Loper Bright Enterprises v. Raimondo*,¹ in which the Court expressly overruled its notorious 1984 decision, *Chevron, U.S.A., Inc. v. NRDC, Inc.*² The Court's decision means that it will no longer give so-called "*Chevron* deference" to federal agency interpretations of federal statutes. Almost every legal observer agrees that *Loper Bright* is likely to have far-reaching effects in agency enforcement and litigation contexts, particularly those involving politically sensitive subject matters.

But how will *Loper Bright* impact attorneys in the intellectual property ("IP") space? IP practitioners often find themselves enmeshed in legal disputes involving federal agencies such as the U.S. Patent and Trademark Office ("PTO"), including the Patent Trial and Appeal Board ("PTAB") and Trademark Trial and Appeal Board ("TTAB"), the U.S. Copyright Office, and the United States International Trade Commission ("ITC"). Practice before such agencies, for example, necessarily involves a labyrinth of agency regulations designed to implement federal statutes originally enacted by Congress. And the question always arises: is the agency's implementation of regulation faithful to the Congressional statute?

Supreme Court of the United States.
Photo by Sean Pavone Photo via Adobe Stock.



answering this question, “[t]he court need not [have] conclude[d] that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”⁸

Exemplary Applications of Chevron Deference in IP Contexts

In the IP context, *Chevron* was potentially applicable whenever federal district courts reviewed federal statutory interpretations of agencies authorized to implement aspects of IP law, such as most prominently the PTAB, the TTAB, and the ITC.

For instance, in *Cuozzo Speed Technologies, LLC v. Lee*,⁹ the PTO had promulgated a regulation requiring the PTAB to give patent claims their “broadest reasonable interpretation” (“BRI”) during inter partes review (“IPR”) proceedings,¹⁰ despite the fact that the federal statutory scheme establishing IPRs did not provide for this standard of review.¹¹ After the PTAB reviewed a patent using the BRI standard and canceled certain claims on obviousness grounds, the patent owner appealed, arguing that the PTO’s BRI regulation exceeded the PTO’s authority under the relevant federal statutes.¹² Applying *Chevron* deference, the Supreme Court upheld the PTO’s regulation, holding that the federal statutes were silent on the issue (and thus ambiguous) and that the PTO’s implementing regulation was reasonable.¹³

Similarly, in *Harmonic Inc. v. Avid Technology, Inc.*,¹⁴ the Federal Circuit addressed the propriety of a PTO regulation permitting the PTAB to institute an IPR proceeding based on only some of the grounds of unpatentability that had been originally advanced by the petitioner.¹⁵ The Federal Circuit concluded that, under *Chevron*, the regulation was a reasonable exercise of the PTO’s authority to administer IPR proceedings.¹⁶

In *Suprema, Inc. v. International Trade Commission*,¹⁷ the Federal Circuit was asked to address the ITC’s interpretation of 19 U.S.C. § 1337(a)(1)(B)(i), which makes it illegal *inter alia* to import into the

In the aftermath of *Loper Bright*, IP practitioners will have enhanced opportunities to challenge an agency’s statutory interpretations in whatever form they are manifested. IP practitioners should be alert to these opportunities post-*Loper Bright*.

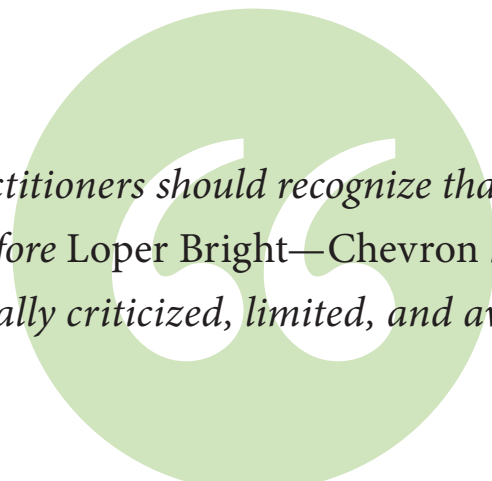
On the other hand, IP practitioners should recognize that—even years before *Loper Bright*—*Chevron* had been judicially criticized, limited, and avoided. Where courts did not agree with agency interpretations, courts were generally able to circumvent the deference to agencies that *Chevron* purported to require. Thus, it remains to be seen just how significant a role *Loper Bright* will play in the IP arena from a practical standpoint.

The Birth of *Chevron* Deference

As every first-year law student learns, since the beginning of our Republic, it has been, “emphatically the province and

duty of the judicial department to say what the law is.”³ In *Chevron*, however, the Supreme Court added an important caveat. When a court was asked to review a federal agency’s interpretation of a federal statute that the agency is responsible for administering, the court was required to engage in a more deferential two-step analysis that subsequently became known as “*Chevron* deference.”⁴

Under *Chevron* deference, at “*Chevron* step one,” the court was first required to determine whether the relevant statutory provision is clear and unambiguous with respect to the specific issue at hand; if it was, then the plain meaning of the statute would be given effect.⁵ But if it was ambiguous, then “the court [did] not simply impose its own construction on the statute.”⁶ Instead, under “*Chevron* step two,” “the question for the court [was] whether the agency’s answer is based on a permissible construction of the statute.”⁷ In



IP practitioners should recognize that—even years before Loper Bright—Chevron had been judicially criticized, limited, and avoided.

United States “articles that [...] infringe a valid and enforceable United States patent.” The patent claim at issue recited a “method for capturing and processing a fingerprint image,” and the respondent Suprema was accused of violating the statute by selling fingerprint scanners.¹⁸ Notably, however, the method claim was not even arguably infringed by U.S. consumers until after the scanners had been imported into the United States, and the question was whether a foreign respondent could violate the statute under an *indirect* infringement theory where the accused products did not and could not *directly* infringe at the time of importation.¹⁹ The ITC held that it could and found a violation based on indirect infringement.²⁰ On appeal, the Federal Circuit determined that section 1337(a)(1)(B)(i) was ambiguous as to whether a violation could be premised on indirect infringement and, applying *Chevron* deference, held that the ITC’s interpretation was reasonable.²¹

And in *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*,²² Kodak initiated opposition proceedings before the TTAB challenging a trademark applicant’s attempt to register the numbers “6200,” “6800,” and “8100” as trademarks on the principal register on an “intent-to-use” basis.²³ The TTAB dismissed the opposition without prejudice,

in effect holding that numerical designators are presumptively not descriptive under 15 U.S.C. § 1052(e) in an “intent-to-use” context.²⁴ On appeal, the Federal Circuit applied *Chevron* deference, concluded that the statute was not clear and unambiguous on the point, and held that the TTAB’s interpretation of the Lanham Act was reasonable.²⁵

Chevron Is Criticized, Limited, and Avoided

At the same time that *Chevron* was being applied in deference to agency decisions in many administrative contexts, however, the doctrine was being consistently criticized, limited, and avoided in other cases.²⁶

One important example occurred in *United States v. Mead*,²⁷ decided in 2001. In *Mead*, the Court expressly limited *Chevron* deference to circumstances in which “Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority.”²⁸ The Court clarified: “Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”²⁹ Significantly, this confirmed that

“interpretations contained in policy statements, agency manuals, and enforcement guidelines” as a rule were not entitled to *Chevron* deference.³⁰

Consistent with this guidance, in the IP context, many courts have declined to defer to discussions of law or statute contained in PTO manuals and guidelines.³¹

Courts also recognized that *Chevron* deference was limited to agency interpretations of federal *statutes*; agency interpretations of their own *regulations* were outside the scope of *Chevron*.³² Instead, agency interpretations of regulations since 1997 had been subject to so-called *Auer* deference, which was different.³³ And by 2019, the Court had severely limited the scope of even *Auer* deference.³⁴

Even when *Chevron* deference was relevant, courts frequently found reasons to avoid its application. In numerous cases, for example, courts found that the statute at issue was unambiguous, and thus that the analysis stopped at *Chevron* step one.³⁵ In *Facebook, Inc. v. Windy City Innovations, LLC*,³⁶ for instance, the statutory provision at issue, 35 U.S.C. § 315(c), governed joinder of parties in IPR proceedings. That provision specifies that the PTO “may join as a party to that inter partes review any person who properly files a petition”³⁷

At Facebook’s request, the PTAB had instituted IPRs covering certain claims of four patents.³⁸ After the one-year time bar for instituting IPRs on those patents had passed, Facebook filed additional IPR petitions seeking to have additional claims from the same patents reviewed, and it moved for joinder of the new requests with its own already-instituted IPRs under section 315(c).³⁹ After the PTAB instituted the new IPRs and granted the joinder motions,⁴⁰ the Federal Circuit vacated the PTAB’s ultimate decisions on the new claims, holding in relevant part that section 315(c) was not ambiguous, that it unambiguously did not permit same-party joinder, and thus that *Chevron* did not require deference to the PTAB’s contrary understanding.⁴¹

In other cases, courts declined to defer to agencies under *Chevron* step two. For

example, *Aqua Products, Inc. v. Matal*⁴² involved the question of what party to an IPR bears the burden of proof when the patent owner seeks to amend a claim at issue during the IPR proceeding: does the burden of proving unpatentability remain on the petitioner even in connection with the proposed substitute claim, or must the patent owner demonstrate that the proposed substitute claim would be patentable over the prior art of record?⁴³ Congress had authorized the PTO to promulgate regulations “setting forth standards and procedures for allowing the patent owner to move to amend,”⁴⁴ and it did so.⁴⁵

Under the PTO’s regulations, a patent owner seeking to amend must file a motion to amend that *inter alia* “respond[s] to a ground of unpatentability involved in the [IPR].”⁴⁶ A different PTO regulation specifies that a “moving party has the burden of proof to establish that it is entitled to the requested belief.”⁴⁷ In reliance on these provisions, the PTAB’s practice was to place the burden of proof on the patent owner in an amendment scenario.⁴⁸ On the other hand, the governing federal statute, 35 U.S.C. § 316(e), provided without qualification: “In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.”⁴⁹ The Federal

Circuit held that the PTO regulations at issue did not in fact address whether a patent owner bears the burden of proof as to patentability, and since the regulations did not purport to engage in statutory interpretation on this question, there was no basis for *Chevron* deference.⁵⁰

Loper Bright Overrules Chevron


In June 2024, the Supreme Court in *Loper Bright* overruled *Chevron*. The Court focused on the separation of powers under the Constitution and the requirements of the Administrative Procedure Act (“APA”)—both of which require the judiciary to independently interpret the law in the first instance, without deference to agency interpretations.⁵¹ Under our constitutional system, “the final ‘interpretation of the laws’ would be ‘the proper and peculiar province of the courts,’” and the Constitution was structured “to allow judges to exercise [their] judgment independent of influence from the political branches.”⁵² And the APA crystallizes the judiciary’s role, providing that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action” and that the court shall “hold unlawful and set aside agency action,

findings, and conclusions found to be . . . not in accordance with law.”⁵³ *Chevron* deference was fundamentally inconsistent with these principles and misguided.⁵⁴

From a more pragmatic standpoint, the Court decried the fact that, under *Chevron* deference, there was effectively “a license authorizing an agency to change positions as much as it likes,” depending on which way the political wind happened to be blowing at any given time.⁵⁵ An agency’s ability to modify its statutory interpretations without fear of judicial oversight “foster[ed] unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.”⁵⁶ To the majority, this meant that *Chevron* should not be upheld on the basis of *stare decisis*, since the legal instabilities set in motion by *Chevron* ran directly contrary to the doctrine’s underlying purpose.⁵⁷

Having decisively overruled *Chevron*, however, the Court also made a conscious effort to soften the edges of its ruling. Although courts are the final arbiters on questions of law, that did not mean that statutory interpretation need be conducted in a vacuum, divorced from agency participation or input.⁵⁸ To the contrary, “although an agency’s interpretation of a statute ‘cannot bind a court,’ it may be especially informative ‘to the extent it rests on factual premises within [the agency’s] expertise.”⁵⁹ In other words, an agency’s statutory interpretation, if well-founded, may have a “particular ‘power to persuade, if lacking power to control.’”⁶⁰

Moreover, somewhat ironically, the Court noted that prior decisions in which *Chevron* deference had been applied to agency actions would be subject to *stare decisis*.⁶¹ In other words, the Court did not see its change in interpretive methodology as providing an automatic basis to revisit prior rulings in which *Chevron* deference had been applied.⁶²



Even when Chevron deference was relevant, courts frequently found reasons to avoid its application.

How Will *Chevron's* Demise Impact IP Disputes Going Forward?

The dissent⁶³ in *Loper Bright* stridently criticized the majority for attempting to “turn [] itself into the country’s administrative czar” in an effort to “roll back agency authority.”⁶⁴ According to the dissent, *Loper Bright’s* overruling of *Chevron* represents an “overhauling [of] a cornerstone of administrative law” that “is likely to produce large-scale disruption.”⁶⁵

External critics of the Court’s *Loper Bright* decision have expressed similar alarm. In the environmental context, for example, observers have contended that “the ruling opens the door to challenges to many rules related to environmental guidance documents and policies issued by the Environmental Protection Agency (‘EPA’) and state agencies involving air and water quality, climate change, and other environmental and public health policies, and EPA will likely have a more difficult time defending enforcement actions and rulemakings.”⁶⁶ And in the employment context, another observer expressed concern that “the flood gates of legal challenges may very well open with respect to many of the [employment and labor-related federal] agencies’ interpretations, causing further question and likelihood that particular rules protecting employees and job applicants will be struck down by the courts.”⁶⁷

But in the context of IP law, does *Loper Bright* justify that kind of alarmism? Perhaps not. The federal laws and regulations concerning patent, trademark, and copyright law rarely if ever present the kind of sensitive, hot button political issues that can arise in other contexts, such as environmental or employment law. There, agency policies and accompanying statutory interpretations can vary widely from administration to administration, particularly in this era of political polarization. But IP typically fails to arouse the same kind of political fervor, and the political regime underlying the PTO and the U.S. Copyright Office has never exhibited the kinds of regulatory fluctuations that caused the *Loper Bright* majority concern. In the IP context at least, courts likely will

continue to depend heavily on the agencies’ “body of experience and informed judgment . . . for guidance.”⁶⁸

Certainly, however, the end of *Chevron* deference does mean that IP litigators will have new opportunities to challenge adverse agency action using statutory interpretation arguments. *Loper Bright* has sent a clear message to lower courts that agency interpretations are not sacrosanct and may be second guessed. And although the Court promised that *stare decisis* would leave prior court rulings based on *Chevron* undisturbed, the reality for IP practitioners is that the Court rarely grants certiorari in patent, trademark, and copyright cases.⁶⁹ Indeed, the author is only aware of one IP case in which the Court has ever applied *Chevron* deference—and the PTO regulation at issue in that case has since been amended.⁷⁰ In the absence of definitive rulings from the Court, every IP decision in which *Chevron* deference was previously applied is theoretically as open to challenge as it has ever been.

The bottom line is that IP attorneys practicing before agencies such as the PTO (including the PTAB and TTAB), the U.S. Copyright Office, and the ITC should be alert to potential challenges to agency statutory interpretations. Under *Loper Bright*, courts now have a clear mandate to reevaluate and, where necessary, to correct agency actions that are inconsistent with the federal statutory frameworks underlying our IP regimes. *Loper Bright* can and should be on every IP attorney’s “radar screen.” But how much *Loper Bright* ultimately will change the IP landscape going forward is still unclear.



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Endnotes

1. ___ U.S. ___, 144 S. Ct. 2244 (2024).
2. 467 U.S. 837 (1984).

3. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

4. See generally *Chevron*, 467 U.S. at 842–45; see also, e.g., Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 Duke L.J. Online 149 (May 2016).

5. *Id.* at 842–43.

6. *Id.* at 843.

7. *Id.*

8. *Id.* n.11.

9. 579 U.S. 261 (2016).

10. 37 C.F.R. § 42.100(b) (2012). The regulation has since been amended to eliminate BRI review. See 37 C.F.R. § 42.100(b) (2024).

11. See, e.g., 35 U.S.C. § 316.

12. 579 U.S. at 276.

13. See *id.* at 276–83.

14. 815 F.3d 1356 (Fed. Cir. 2016).

15. 37 C.F.R. § 42.108(a) (2012). The regulation has since been amended to require IPR institution on all challenged claims and all asserted grounds of unpatentability, if an IPR is instituted at all. See 37 C.F.R. § 42.108(a).

16. 815 F.3d at 1367–68.

17. 796 F.3d 1338 (Fed. Cir. 2015) (en banc).

18. See *id.* at 1341–42.

19. See *id.* at 1342–43.

20. *Id.* at 1343.

21. *Id.* at 1345–53.

22. 994 F.2d 1569 (Fed. Cir. 1993).

23. See *id.* at 1570.

24. See *id.* at 1571.

25. *Id.* at 1571–76.

26. See generally *Loper Bright*, 144 S. Ct. at 2268–72.

27. 533 U.S. 218 (2001).

28. *Id.* at 226–27.

29. *Id.* at 227.

30. *Id.* at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

31. See, e.g., *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1344 n.2 (Fed. Cir. 2018) (observing that the PTO Trial Practice Guide is not entitled to *Chevron* deference); see also *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1370 (Fed. Cir. 2018) (stating that the PTO’s Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) was entitled to judicial deference only so far as its “power to persuade”); but see *O’Shannessy v. Doll*, 566 F. Supp. 2d 486, 491 n.4 (E.D. Va. 2008) (giving deference to MPEP) (citing *Heinl v. Godici*, 143 F. Supp. 2d 593, 601 n.15 (E.D. Va. 2001)); *Fressola v. Manbeck*, 36 U.S.P.Q. 2d (BNA) 1211, 1213 (D.D.C. 1995) (same).

32. See, e.g., *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (noting that *Chevron* deference was inapplicable to PTO interpretation of 37 C.F.R. § 2.21, a PTO regulation related to trademark applications).

33. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (“Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

34. See *Kisor v. Wilkie*, 588 U.S. 558, 568–80 (2019).

35. See, e.g., *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 369–70 (2018) (holding that the federal statutes underlying IPR proceedings, particularly 35 U.S.C. § 318(a), unambiguously required the PTAB, to the extent it institutes an IPR proceeding, to adjudicate the patentability of every patent

claim originally challenged by the petitioner); *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1338–39 (Fed. Cir. 2020) (holding that the IPR joinder provision set forth in 35 U.S.C. § 315(c) unambiguously does not authorize same-party joinder, and thus the court need not defer to the PTAB's contrary interpretation); *Applications in Internet Time*, 897 F.3d at 1346–51 (holding that the term "real party in interest" as used in the IPR time bar provision contained in 35 U.S.C. § 315(b) is unambiguous, and thus the court need not defer to the PTAB's different interpretation).

36. 973 F.3d 1321.

37. 35 U.S.C. § 315(c).

38. *Facebook*, 973 F.3d at 1325.

39. *Id.*

40. *Id.*

41. *Id.* at 1338–39.

42. 872 F.3d 1290 (Fed. Cir. 2017) (en banc).

43. *Id.* at 1297–98.

44. 35 U.S.C. § 316(a)(9).

45. See, e.g., 37 C.F.R. § 42.121.

46. 37 C.F.R. § 42.121(a).

47. 37 C.F.R. § 42.20.

48. See, e.g., *Idle Free Sys., Inc. v. Bergstrom*, IPR 2012-00027, 2013 Pat. App. LEXIS 6302, 2013 WL 5947697, at *4 (PTAB June 11, 2013).

49. 35 U.S.C. § 316(e).

50. *Aqua Prods.*, 872 F.3d at 1316–25.

51. E.g., *Loper Bright*, 144 S. Ct. at 2273.

52. *Id.* at 2257 (quoting *The Federalist* No. 78, at 525 (J. Cooke ed. 1961) (A. Hamilton)).

53. *Loper Bright*, 144 S. Ct. at 2261 (quoting 5 U.S.C. § 706).

54. *Loper Bright*, 144 S. Ct. at 2273.

55. *Id.* at 2272.

56. *Id.*

57. *Id.*

58. See, e.g., *id.* at 2267 ("Courts, after all, do not decide [statutory interpretation] questions blindly.").

59. *Id.* (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983)).

60. *Loper Bright*, 144 S. Ct. at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Loper*

Bright, 144 S. Ct. at 2273 ("Careful attention to the judgment of the Executive Branch may help inform [the statutory interpretation] inquiry.").

61. *Id.*

62. *Id.*

63. Justice Kagan authored the dissent, joined by Justices Sotomayor and Jackson.

64. *Id.* at 2295, 2311.

65. *Id.* at 2311.

66. Margaret Anne Hill et al., *The Supreme Court Ends Chevron Deference—What Does This Mean for Environmental Regulation and Enforcement?*, *Nat'l Law Rev.* (July 2, 2024).

67. Ethan Krasnoo, *Anticipated Effects of the U.S. Supreme Court's Eradication of Chevron Deference on Employment Agency Rules*, *Mondaq Business Briefing* (July 5, 2024).

68. *Skidmore*, 323 U.S. at 140.

69. See *Loper Bright*, 144 S. Ct. at 2272.

70. See *Cuozzo Speed Techs.*, 579 U.S. at 280–83 (adjudicating the interpretation of since-amended 37 C.F.R. § 42.100(b) (2012)).

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Aka Alexis Kate Titeca, Alexis Kate Poul
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1860

-1866
First lawyers
admitted to practice
in the Idaho Territory

-1891-
William E. Borah
(The Lion of Idaho)
admitted to practice
law in Idaho

-1871-
James H. Hawley
admitted to practice
law in Idaho

-1895
Helen Young,
Idaho's first female
lawyer, admitted
to practice

THE IDAHO STATE BAR THE EARLY Days

Hon. Michael J. Oths

The Idaho State Bar is celebrating its 100th anniversary in 2025. This article recounts the development of the Bar through the end of the 1930s and is drawn from minutes and transcripts of the annual meetings. It is also part of a larger project to document the history of the Bar.

The notion of lawyers gathering to share knowledge and fellowship long predates our country. In medieval England, Roman Catholic clergy customarily taught law. In 1218, Pope Honorius III decreed that Roman civil law should take precedence and prohibited clergy from teaching English common law. In response, King Henry III prohibited the teaching of civil law. This schism between the Church and the Crown led to the formation of Inns of Court, geared to common law. Those Inns, combining both social and academic elements, survive, in some form, to our current time.

Until the late 19th Century, bar associations as we know them did not exist in this country. Nevertheless, informal collections of lawyers were a vital part of the practice of law, especially in

frontier areas. In Illinois, for example, Abraham Lincoln and his colleagues "rode the circuit" for months at a time, resolving lawsuits by day and conducting post mortem in the tavern by night (Lincoln, by the way, was a teetotaler).¹

The American Bar Association was formed in 1876, in Saratoga Springs, New York. Its stated purpose was:

"The advancement of the science of jurisprudence, the promotion of the administration of justice and a uniformity of legislation throughout the country...."

The first lawyers to practice in the Idaho Territory were admitted in 1866.² In those early days, verifying a lawyer's *bona fides* could be problematic, but the Court's response to misrepresentation could be swift. One lawyer from the very early days was disbarred almost immediately. His name is crossed out in the lawyer registry and in red ink is written: "A warning to all guilty of like turpitude."

The early registry includes some noteworthy names. Future Governor of Idaho and Bar President James H.

Hawley was admitted in 1871. William E. Borah ("The Lion of Idaho") was admitted in 1891. Idaho's first female lawyer, Helen Young, was admitted in 1895. Later, in 1911, Branch Rickey briefly practiced law in Boise, prior to attaining fame for bringing Jackie Robinson to Major League Baseball.

FIRST VOLUNTARY BAR

By statehood, in 1890, there is no known record of any formal organization of Idaho lawyers. The first *state wide*³ bar association ("ISBA") was formed in 1899.

While we don't have any minutes of the 1899 meeting, there is a transcript of a speech given by the President, Richard Z. Johnson. He was one of the first Idaho lawyers, admitted in 1867.⁴ The 1899 meeting was in Boise and President Johnson noted that invitations had been sent to every other county in the state and that they had received exactly zero replies. He suggested biennial meetings, due to the travel difficulties in Idaho.⁵

President Johnson noted the need for lawyers to keep up with advancing

-1899
First voluntary statewide bar association formed

-1923
Bill passed the Legislature to create a mandatory bar association, but no money appropriated for operation

-1928
Proposal that judges should be appointed by the Governor from a supplied list

-1930
Creation of a Judicial Council

-1937-
Reciprocal admission abolished & six month residency requirement enacted

-1921-
First known minutes of the voluntary Idaho State Bar Association produced

-1925
New bill passed the Legislature to create the current mandatory bar & first Annual Meeting held in Lewiston

-1933
First mention of the "Idaho Law Journal," which appears to be the precursor to the Idaho Law Review

-1935
Bar disciplinary hearings opened to the public

1940



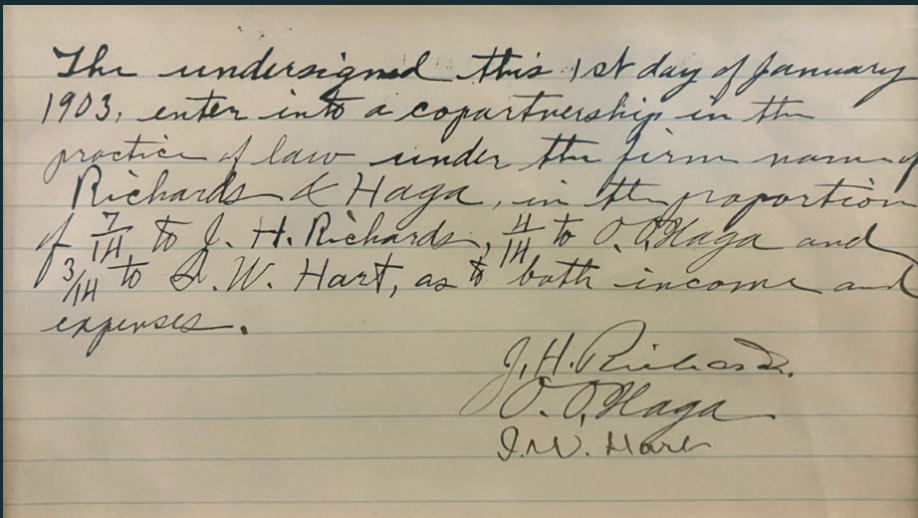
James H. Hawley. Photo courtesy of Hawley Troxell.



Helen Young. Idaho's first woman admitted to the Bar.



Oliver "O" O. Haga. Photo courtesy of Neil D. McFeely and Eberle Berlin.



A handwritten partnership agreement from 1903, showing the simplicity of a two sentence partnership agreement. Photo courtesy of Neil D. McFeely and Eberle Berlin.

technology specifically the telegraph. The bulk of his talk was devoted to criticism of the proposed Civil Code pending in the Legislature. He complimented the new edition of Revised Statutes, which was apparently printed in Omaha.

After the 1899 meeting, records are sketchy until after World War I, although we do have a list of the bar officers from those first 20 years. Later minutes indicate the ISB held no meetings between 1901 and 1909. It is clear the ISBA was a voluntary organization with limited enthusiasm.

EARLY BAR OFFICERS

During this period some noteworthy lawyers were officers of the ISBA.

Oliver O. Haga was Treasurer from 1909 to 1911. He was one of the founders of the firm now known as Eberle, Berlin, Kading, Turnbow and McKlveen.

James Hawley was President from 1917 1919 following by six years his term as Governor. He was the first of three members of his family to serve as President, preceding his son, Jess, in the 1920s and his grandson, Jack, in the 1970s.

O.W. Worthwine served as Secretary during the same period. He had been a college football player for the University of Chicago, whose coach was the legendary Amos Alonzo Stagg. Worthwine had a long and colorful history in Boise, starting with his time as a coach for Boise High School. In that role he promoted a "National Championship" football game between Boise High and Wendell Phillips High School of Chicago, in 1912. He eventually entered a law partnership with the firm of Hawley, Puckett and Hawley and



O.W. Worthwine at his desk in his Idaho Building office, 1949.⁶

appears in the Idaho State Bar minutes for decades thereafter.

The first known minutes of the ISBA were produced in 1921. That meeting was held in January, in Boise. Dues were set at \$2.00 per year. The treasury balance was \$919, and the members voted to raise the Bar Secretary's compensation by 140 percent, to \$120 per year.

The roster from that 1921 meeting lists no women in attendance. The participants discussed a number of topics, including whether the Bar should implement minimum fees schedules and whether to pursue formation of a mandatory bar association.

The President, future Idaho Supreme Court Justice James Ailshie, made a lengthy address to the membership. Many of his topics probably sound familiar, like the distrust by the public of lawyers and courts and that losing parties blamed the system. He urged prosecution of unauthorized practice of law ("UPOL") cases, advocated for the streamlining of discipline cases, and stressed the need to address delays in the court system. He also suggested that bar meetings necessarily needed to be held in Boise. As we will see, the contention over where to hold the Bar convention has ebbed and flowed over the following decades.

The meeting concluded with a speaker from Twin Falls making a speech



Boise Senior High School Football team 1912. Coached by Oscar W. Worthwine.⁷

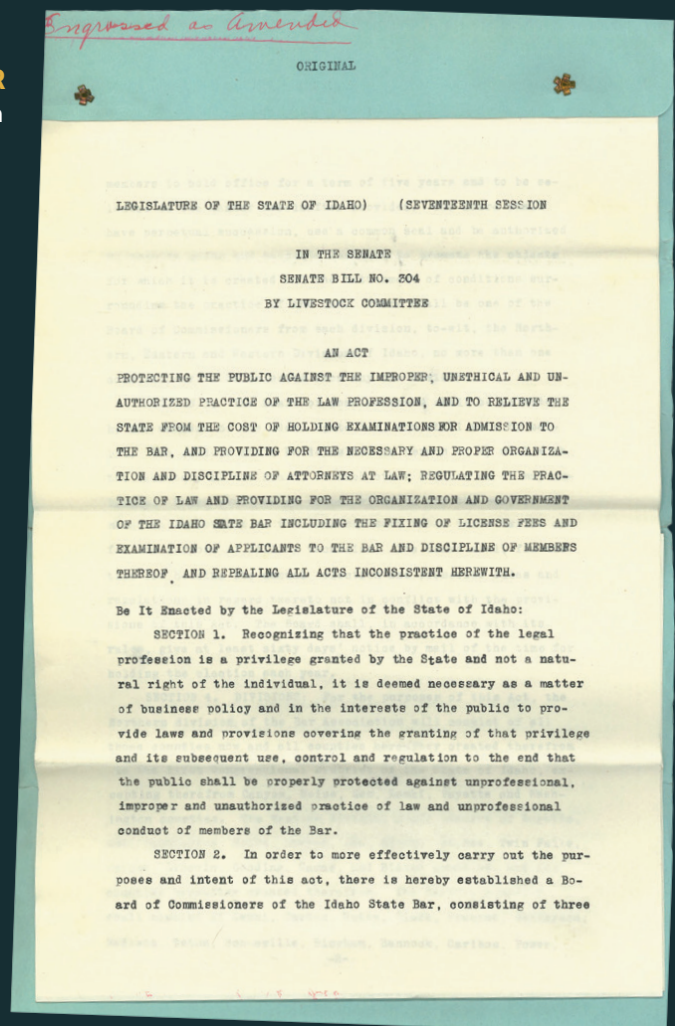
about suggestions for improvement of the Bar, including fall meetings for better weather and to better prepare for the legislative sessions. He suggested the need for district meetings. Finally, he noted that the 1919 meeting had included all Boise law yers, except two.

THE MANDATORY BAR

Two years later, in 1923, the Bar had finalized a proposal for the formation of a mandatory bar association. The concept of a mandatory (or integrated) bar was in its infancy. North Dakota was the first state to form an integrated bar, in 1921. Alabama and Idaho would be next, in 1923. (In the "insert joke here" category, the Bar organization bill was introduced through the livestock committee).

The first page of the original Senate bill creating the Idaho State Bar. Images courtesy of the Legislative Service Office with a special thanks to Layce Silvey, Legislative Librarian.

The careful reader will ask, "Why are we celebrating a one hundred year anniversary in 2025 if the Bar was formed in 1923?" After the January 1923 ISBA meeting, the proposed legislation creating the Bar was filed. The



bill passed in that year's Legislature, creating a Board of Commissioners and providing for annual meetings.

Unfortunately, no money was appropriated for the operation of the Bar, so nothing happened other than an organizational meeting. The intent of the bill was for Bar dues to be the source of funds, but the State Auditor refused to handle it that way, contending that the bill had not included an "appropriation" as required by the state constitution. The officers of the bar filed a writ of mandate in the Supreme Court, resulting in the case of *Jackson v. Gallett*.⁸

A divided Idaho Supreme Court sided with the Auditor and denied the writ of mandate. The proponents then went back to the 1925 Legislature with a new bill, which also passed. That bill apparently satisfied the concerns from *Jackson v. Gallett*.

FIRST ANNUAL MEETING

The first actual meeting of the Idaho State Bar ("ISB") was held in September 1925, in Lewiston. Despite Judge Ailshie's suggestion, the first five annual meetings were held throughout the state. After Lewiston in 1925, they were held the following years in Pocatello, Boise, Coeur d'Alene, and Idaho Falls respectively.

After multiple attempts to encourage attendance, the Board of Commissioners concluded that holding the meetings in "summer resort areas" might show an improvement, so the meetings were held in McCall and Hailey in the mid 1930s.

At one point, former President Ailshie even suggested that lawyers who failed to attend a bar meeting for three straight years should be disbarred! The Bar also considered tripling bar dues to \$15 but offering a \$10 refund if a lawyer attended the Bar meeting.

Other efforts to increase participation included the creation of the first sections: a judicial council and a prosecutors' section, with consideration given to creating a young lawyer section. District Bars were also created for the first time.

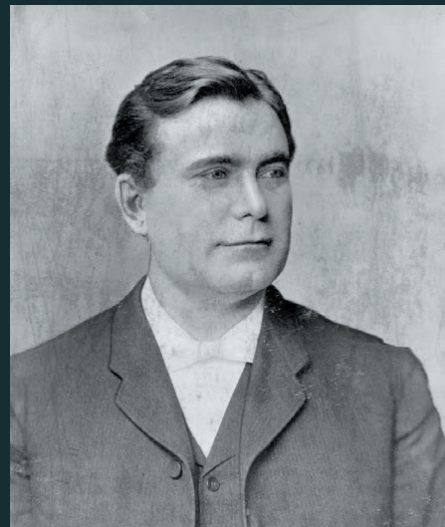
The spirit of inclusion apparently did not extend to female members of

the Bar. In 1935, the President reminded those in attendance to tell their wives that the annual banquet was a "stag" event. Mary Smith, of Rexburg, is the first woman to appear in the transcripts, in 1937, when she made an address to the Annual Meeting about the need for reform in the Idaho pardon system. She apparently wasn't invited to the banquet, however, a fact she noted in her address.⁹

BORAH

Over the years, Senator William Edgar Borah was an active participant in the Idaho State Bar, which is something of an irony, since a recurring criticism was that he never spent time in Idaho—he only lived here from 1891 to 1906.

In 1925, the Bar had invited a speaker from San Francisco to discuss the need for a World Court. He agreed, then balked unless Senator Borah would come and debate the question. In fact, Borah did agree on short notice and came to Lewiston. Senator Borah's objection to the World Court was tied to his complete objection to



William E. Borah. Photo credit: Idaho State Archives, [unknown, D 102 A].

the League of Nations and anything he thought was associated with it.

In 1927, Borah addressed the Annual Meeting on the "Mexican Land Problem" which had its roots in leased oil lands. In his introductory remarks that year he noted that in the Senate cloakroom he had been touting Governor Hawley as one of the country's most accomplished

RECURRING TOPICS

The legal concerns expressed during the Annual Meetings varied, but again bear some familiarity to current times. Some of the concepts just took time to be realized.

In 1923, it was the need to curb "voluminous pleadings".

In 1925, juvenile delinquency was perceived to be a burgeoning problem, with the claim it was up 100% from 1918-1923. One cited reason was that places of low morals (i.e. picture shows) were open on Sunday, but not libraries.

In 1926, a speaker argued that all constitutional amendments after the Bill of Rights were bad and should be repealed. That same year, the secretary of the ABA spoke about the modern need for laws governing aviation and regulation of radio broadcast waves.

In 1927, the Bar discussed whether to create a Court of Appeals, something which was eventually done in 1982.

Throughout the 20s and 30s, the Bar debated the need for minimum fee schedules. Those fee schedules were widely used throughout the country, and a 1958 Idaho State Bar ethics opinion even declared it unethical for a lawyer to deviate from charging at least a minimum fee. By the 1970's, under threat of antitrust litigation, such schedules had been largely abandoned nationwide.

In 1938, the Bar discussed whether Idaho should implement what we now call Rule 25 disqualifications. That rule has been a moving target even to the present time.

trial lawyers. He noted that one of his fellow Senators piped up that Hawley had been handicapped by his choice of co-counsel in the Steunenberg assassination trial. The co-counsel, of course, was Borah himself.

In 1934, Senator Borah's treatise was read concerning adherence to the Constitution (which can be read as a comment on the New Deal). He also delivered an address and again expressed his opposition to the proposed World Court.

JUDICIAL ISSUES

The preferred method of making judicial selections was (as it continues to be) an ongoing topic of concern. Beginning in the late 20s, the Bar began to advocate for non-partisan judicial elections and the Legislature eventually agreed in 1933. In 1928, a member of the Bar proposed that judges should be appointed by the Governor, from a supplied list—a concept that again was realized nearly a half-century later. The Legislature was far less sympathetic to

suggestions that the Bar should control the process of judicial selection or that Supreme Court terms be for 10 years.

By around 1930, the Bar had created a Judicial Council, consisting of lawyers and judges, with the intent to make policy recommendations to the Legislature and Supreme Court. One suggestion was to abolish probate courts altogether (accomplished in 1970). Another was that county clerks shouldn't be elected officials (at least as regards court duties).

Many of the Judicial Council proposals highlighted a clear division between lawyers from small towns and those from "big cities."

In 1927, Bar Commissioner Jess Hawley noted that the governor had vetoed a judicial pay increase bill and a bill to define UPOL had failed—judicial pay had not increased since 1909. He noted: "The Legislature looks at our bills with suspicion," in that year only four out of 100 legislators were lawyers.

BAR ADMISSIONS

Bar admissions, then as now, were a major concern. In 1923, the Bar discussed the need to make more careful study of applicants from other states, apparently in light of some unworthy applicants slipping through. Initially, the ISB permitted reciprocal admission from other states but in 1937, that was abolished, and a six-month residency requirement was enacted (reciprocal admission was reintroduced in Idaho in 2002). It is interesting to note that from 1925 through 1939 the membership of the Bar declined from 629 lawyers to 515. By 1943, that number had shrunk to 409 (current membership is around 7,400)¹⁰. Much to the present relief of the author, the Bar declined to pursue a 1935 proposal that would have made all lawyers over 65 be examined for continuing competence.

In 1939, the Bar held an extended discussion about whether Idaho should have diploma privilege and decided not to. That year, a speaker spoke to the topic: "Is the Bar exam too focused on minutiae?"



Administration Building, University of Idaho, 1912. Photo credit: University of Idaho Campus Photographs, [University of Idaho Library Special Collections and Archives, PG1_52 10].

FAMILIAR NAMES

Lawyers from the transcripts of the 20s and 30s will be familiar to current ISB members. In 1925, A.L. Merrill was elected as commissioner from Pocatello in a seven way race. In 1928, both Carl Burke Sr. and Raymond Givens Sr. appear in the minutes. Participants in 1936 included Willis Moffatt, future U.S. Senator Herman Welker (then prosecutor from Washington County), and the newly elected Commissioner J.L. Eberle. The 1937 meeting was held in Idaho Falls. The attendees were welcomed by Chase Clark (lawyer, then Mayor of Idaho Falls, future governor and Federal Judge, and father in law of Frank Church). In 1938, the newest Commissioner was Clarence Thomas (different guy). In 1939, E.B. Smith (future ISB President, Supreme Court Justice, and namesake of Quane Smith) gave an address on "should lawyers be bonded?"

UNIVERSITY OF IDAHO COLLEGE OF LAW

The Annual Meeting regularly featured addresses by the dean of the University of Idaho ("UI") College of Law. In 1925, Dean Robert McNair Davis spoke to the convention and noted that his school was "not for the indolent and the stupid." The next year the Bar President noted the original applicants failing the bar had passed, claiming that they had received a wakeup call to study harder. He noted: "A law school is no place to summer fallow athletes."

In 1931, the Bar heard an address from Russ Randall (young lawyer and future Bar President). He discussed that ethics had been removed from UI College of Law curriculum. He also asked that more practical skills be taught in law school. A veteran bar member applauded Mr. Randall as a young lawyer who "know[s] that he does not know anything about the practice of law."¹¹

In 1932, the Twin Falls District Bar, acting on some misinformation about the cost, proposed elimination of the UI College of Law altogether. That drew a sharp and immediate reaction from the dean.

In 1933, the minutes contain the "Idaho Law Journal" which appears to be the forerunner of the UI Law Review.

CRIMINAL LAW

Criminal law topics were regularly discussed, often raised by the Prosecutors' Section. In 1926, a major debate was whether the prosecution should be permitted to comment about a Defendant's election not to testify in a criminal trial. In 1931, a speaker discussed why "plea bargains are bad."

Also, in 1931 it was noted that crime was down statewide. There had been zero felony cases filed in 1929 in Caribou and Oneida Counties, and only one in several other counties. A comment was made that almost half of all criminal cases were "petty" prohibition cases.

In 1934, Judge Koelsch of Boise spoke on public sentiment to speed up trials and suggested it was a myth. He also discussed and opposed a proposal that prosecutors be required to disclose witness lists to Defendants ("only aids unscrupulous defendants"). He further suggested *voir dire* of potential jurors was a waste of time.

OTHER TOPICS

In 1935, bar discipline hearings were opened to the public.

Another topic that has resonated throughout the years is the Bar's concern about unauthorized practice of law. In 1930, it was hoped that recent Supreme Court cases would address that, and in 1936 it was reported that the Bar had succeeded in getting some UPOL judgments versus bond companies.

BAR LEADERSHIP

One constant through the Bar's first two decades was the guiding hand of Bar Secretary Sam Griffin a position now called Executive Director. He served in that role from 1919 to 1951. He and recently retired Executive Director Diane Minnich comprise nearly two thirds of service in that role in the Bar's history.

CONCLUSION

The Idaho State Bar has a rich history through its century of existence. While some of the topics change, many of the concerns from the early decades are woven throughout the years. Continuing to study its origin and history will help to guide the Bar into its next century.

[The author thanks the following people for research assistance in preparation of this article: Supreme Court Clerk Melanie Gagnepain, members of the Legislative Council's Office, Neil McFeeley, Judge Jim Cawthon, and (of course) Diane Minnich].



Hon. Michael Oths is a Senior Magistrate Judge in Ada County. Prior to his appointment as a Magistrate, Oths was Bar Counsel for the Idaho State Bar for 17 years. He spent nine years as a member of the Ada County Historic Preservation Society.

ENDNOTES

1. Willard King: Riding the Circuit with Lincoln, American Heritage, February (1955).
2. The Idaho Supreme Court maintains bound books containing the signature of every lawyer admitted since that time.
3. Italics added because the Idaho State Bar Association was mostly a Boise enterprise.
4. David H. Leroy, From Tents to Towers to Kitchen Tables: The Evolution of the Law Office in Idaho, 67 *The Advocate* 32 (2024).
5. For an illustration of the difficulty of Idaho travel during this era, see J. Anthony Lukas: *Big Trouble*, Simon and Schuster, 1997, pp. 340 *et. seq.*
6. https://boiseguardian.com/wp/wp-content/uploads/2012/08/Friday_August_24_2012_21.pdf.
7. *Id.*
8. 39 Idaho 382, 228 Pac. 1068 (1924). A disciplined lawyer filed a subsequent challenge to the formation of the Bar, but his claims were rejected by our Supreme Court. *In Re Edwards*, 45 Idaho 676, 266 P. 667 (1928).
9. Mary Smith was a longtime law partner of noted Idaho political power Lloyd Adams. She practiced law into the 1990s and is the subject of an in depth interview in the August 1988 issue of *The Advocate*.
10. Idaho State Bar Membership Data (Accessed December 11, 2024).
11. Proceedings of the Idaho State Bar *Idaho Law Journal*, VII (1931), p. 260. https://isb.idaho.gov/wp-content/uploads/ISB_Vol_VII_1931_1897.pdf.



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Court Information

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice
G. Richard Bevan

Justices
Robyn M. Brody
Gregory W. Moeller
Colleen D. Zahn
Cynthia K.C. Meyer

Regular Spring Term for 2025 1st Amended October 3, 2024

Boise January 8, 10, 13 and 17
Boise February 7, 10 and 14
U of I, Boise February 12
Boise April 2, 4, and 7
Moscow U of I, Lewiston April 9 and 10
Boise May 5, 7, 9, 12 and 14
Boise June 2, 6, 9 and 12
Twin Falls June 4

By Order of the Court
Melanie Gagnepain, Clerk

NOTE: The above is the official notice of the 2025 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Arguments for January 2025 12/12/2024

Wednesday, January 8, 2025 - Boise

8:50 a.m. *Latah County v. Tax Commission* #50852
10:00 a.m. *Craig Swapp & Assoc. v. First Judicial Dist.* #51998
11:10 a.m. *ISB v. Oleson* #51857

Friday, January 10, 2025 - Boise

8:50 a.m. *Raber v. Raber* #52309
10:00 a.m. *Taylor v. City of Lava Hot Springs* #50888

Monday, January 13, 2025 - Boise

8:50 a.m. *State v. Bundy* #50333/50715
10:00 a.m. *Hill v. Emergency Medicine* #50686
11:10 a.m. *Children's Home v. Labrador* #50782

Friday, January 17, 2025 - Boise

8:50 a.m. *Ray v. Morgan-Smart* #49946
10:00 a.m. *Lowman v. Morgan-Smart* #50973

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Justice
David W. Gratton

Judges
Molly J. Huskey
Jessica M. Lorello
Michael P. Tribe

Regular Spring Term for 2025 1st Amended 12/10/2024

Boise January 14, 16, 21, and 23
Boise February 11 and 13
Boise March 4, 6, 11, and 13
Boise April 8, 10, 15, and 17
Boise May 13, 15, 22, and 29
Boise June 10, 17, 24, and 26
Boise July 10

By Order of the Court
Melanie Gagnepain, Clerk

NOTE: The above is the official notice of the 2025 Spring Term for Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Arguments for February 2025 12/12/2024

Friday, February 7, 2025 - Boise

8:50 a.m. *Flynn v. The Sun Valley Brewing Co.* #50921
10:00 a.m. *State v. Berry* #51771

Monday, February 10, 2025 - Boise

8:50 a.m. *State v. Popp* #51783
10:00 a.m. *Clark v. Coleman* #51014
11:10 a.m. *Edwards v. IPUC* #51238

Wednesday, February 12, 2025 - U of I, Boise

8:50 a.m. *Bear Crest v. State* #50840
10:00 a.m. *State v. Adams* #50841
11:10 a.m. *Coler v. The Home Depot* #51065

Friday, February 14, 2025 - Boise

8:50 a.m. *Sunnyside Park v. Sorrells* #51049
10:00 a.m. *Milus v. Sun Valley Company* #49693

**Idaho Court of Appeals
Oral Arguments for January 2025**

12/12/2024

January 16, 2025

9:00 a.m. *State v. Samford*..... #50857
 10:30 a.m. *State v. Morgan*..... #51222
 1:30 p.m. *Smith v. Mountain View Hosp*..... #51259

January 21, 2025

9:00 a.m. *Bartosh v. Campbell*..... #52302
 10:30 a.m. *Yates v. Hull Farms*..... #51667
 1:30 p.m. *Miller v. Ross*..... #52192

January 23, 2025

10:30 a.m. *State v. Carrasco*..... #51447
 1:30 p.m. *State v. Molina*..... #50150

**Idaho Court of Appeals
Oral Arguments for February 2025**

12/12/2024

February 11, 2025

10:30 a.m. *Perron v. Martinez*..... #51474
 1:30 p.m. *Valdivinos v. State*..... #51308

February 13, 2025

9:00 a.m. *State v. Escobedo*..... #50157
 10:30 a.m. *Needham v. Needham*..... #51475
 1:30 p.m. *Kovacs v. Kootenai County*..... #51293

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Cases Pending

CASES IN ALPHABETICAL ORDER BY CATEGORY – NOVEMBER 2024

CIVIL APPEALS

First Amendment

Whether the disturbing the peace statute, I.C. § 18-6409, is unconstitutionally overbroad as applied to Defendant's conduct of engaging in a loud protest, which included the use of car horns and air horns, because such conduct is protected speech under the First Amendment.

State v. Lang
Docket No. 51084
Court of Appeals

Jurisdiction

Whether the failure to timely serve a notice of appeal on all persons who were parties and who appeared in the proceedings below, as required by I.A.R. 20, is a jurisdictional defect requiring dismissal of the appeal.

Thaete v. St. Luke's Magic Valley Med. Ctr.
Docket No. 51546
Supreme Court

Post-Conviction

Whether the district court erred in summarily dismissing Petitioner's claim that trial counsel was ineffective for failing to investigate and advise Petitioner regarding a potential involuntary intoxication defense to the battery charges.

Hawker v. State
Docket No. 50946
Court of Appeals

CRIMINAL APPEALS

Evidence

Whether the district court abused its discretion by admitting as substantive evidence under I.R.E. 1006 a video exhibit that contained excerpts of numerous surveillance videos, as well as notations and other information added by the officer who prepared the exhibit.

State v. Ewing
Docket No. 50452
Court of Appeals

Whether the district court erred by admitting a CARES interview as a prior consistent statement offered to rebut a charge of recent fabrication under I.R.E. 802(d)(1)(B)(i) because the interview did not pre-date the witness' motive to lie.

State v. Pendleton
Docket No. 51484
Court of Appeals

Whether evidence of Defendant's prior narcotic use was inadmissible under I.R.E. 404(b) because it was not relevant for any non-propensity purpose and, even if marginally relevant, it was unfairly prejudicial.

State v. Inwood
Docket No. 51143
Court of Appeals

Motion to suppress

Whether the district court erred by concluding that the investigating officer had reasonable suspicion to look into Defendant's eyes during the administration of field sobriety tests, and that he developed probable cause to look into Defendant's nose and mouth.

State v. Razo
Docket No. 50887
Court of Appeals

Whether the officer exceeded the permissible scope of a pat search by manipulating a small, square bulge in Defendant's pocket after it was objectively clear that the item could not possibly be a weapon.

State v. Draney
Docket No. 51307
Court of Appeals

Whether the facts known to the officer gave rise to a reasonable articulable suspicion of drug activity, so as to justify the extension of the traffic stop to pursue a drug investigation.

State v. Frizzell
Docket No. 50061
Court of Appeals

Speedy trial

Whether the district court erred by denying the motion to dismiss and finding that the 18-month delay in bringing Defendant to trial did not violate Defendant's federal or state constitutional speedy trial rights.

State v. Brown
Docket No. 51068
Court of Appeals

Statutory interpretation

Whether the district court erred by holding Idaho's Good Samaritan Act does not apply to a charge of introducing contraband into a jail.

State v. Meeds
Docket No. 51312
Court of Appeals

Sufficiency of evidence

Whether the evidence was sufficient to support the jury verdict finding Defendant guilty of unlawful killing, possessing, or wasting wildlife with a combined damage assessment of over \$1,000, in violation of I.C. § 36-1401(c)(3).

State v. Foust
Docket No. 51458
Court of Appeals

Summarized by:
Lori Fleming
Supreme Court Staff Attorney
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In Memoriam

Hon. William B. Dillon III 1950 – 2024



Bill Dillon, of New Plymouth, Idaho, age 74, passed quietly, with his sister by his side, on September 27, 2024. Bill is

survived by his sister and brothers. He was preceded in death by his loving wife, Nisha; parents and brother.

Bill graduated from Nebraska University of Law and was admitted into the Idaho State Bar in 1978. He moved directly to Idaho to pursue law and his love of hunting and fishing. He was very active in hunting and loved fly fishing in the summers, also he spent time in the Idaho Fly Fishing Association. He loved to return to Nebraska to deer and pheasant hunt with lifelong buddies.

After moving to Idaho, Bill and Nisha met at Albertsons after he worked up the nerve to ask her out. They formed a lifelong friendship and a love that lasted through the ages. They loved the rivers of Idaho, where they camped, fished, and enjoyed time with many friends.

Bill earned his living as a deputy county prosecutor, Attorney for the Idaho Game and Parks, but most people know him as Judge Dillon. Bill served the state of Idaho as a Judge for many years until he permanently retired in 2022. He mostly worked in Payette and Canyon counties. Bill enjoyed being able to perform marriage ceremonies as a judge and did many in his career.

William J. Wray 1963 – 2024



William Joseph Wray of Las Vegas, NV, was a beloved husband, father, son, grandfather, brother, and uncle. He passed away unexpectedly due to cardiac arrest, on Oct. 2, 2024.

Bill was born to Bob and Gertrude Wray, of Moreland, ID., on Feb. 21, 1963, the 4th of 6 children. As a child, Bill worked alongside his family on their desert farm, moving pipe, putting up fence, clearing

rock, working in the harvest, feeding cattle and anything else that needed to be done. He was highly intelligent and valued learning. He loved to read, play chess, and examine things under his microscope, and he loved music. He always had compassion for others and a sense of justice which helped lead him to his future career as an attorney.

Bill graduated from Snake River High School in 1981 near the top of his class. Shortly thereafter, he served a mission for the Church of Jesus Christ of Latter-day Saints in Korea and New York City, opening the first Korean-speaking mission in the United States. It was there in New York City that he met and baptized Myung Sup “Kim”, who would later become his bride when they were married in Idaho Falls in 1984.

Bill aspired to higher learning graduating from Pace University with his undergraduate degree, followed by earning a Juris doctorate at St. John Law School in New York City. While they were in New York City, their three lovely children were born, Joseph, Daniel, and Michelle. They later moved to Las Vegas, NV. He was admitted to the Idaho State Bar in 1992.

He cultivated his love of learning and music in his children and encouraged them to develop their talents. He was their biggest cheerleader, and he was never afraid to belt out a song, especially a rock hit from the 70’s and he never needed lyrics. Bill and Kim made family a priority, visiting them in Idaho and Korea often and welcoming them into their home. If you ever visited Bill, you were keenly aware of how generous he and Kim were. Kim would always provide abundant food, often homemade Korean dishes, and an immaculate room to stay in. Bill was a great entertainer, sharing humorous stories and laughing easily.

R. John Insinger 1947 – 2024



John Insinger passed away peacefully on September 14 at his home in Ketchum. Born in La Jolla, CA on March 1, 1947, John enjoyed many adventures from a young age.

At the age of 11, he sailed with his parents and siblings throughout the South Pacific Ocean for a year with stops in Tahiti, Samoa, Guadalcanal and many other islands. His love of sailing was born in those days. He lived the typical California lifestyle in his younger years; surfing in the summers when he wasn’t working on one of his father’s commercial fishing vessels. He graduated from La Jolla High School, class of 1965.

John’s parents, Bob and Betty Insinger, began bringing their family to Sun Valley to ski in 1963, and that was all it took to fall in love with Idaho. John helped build the family vacation home in North Fork, north of Ketchum in the late 1960’s and was a Sun Valley ski instructor under Sigi and Sepp in his early 20’s, until he met his wife of 55 years, Susan Clarke. Once “settled down”, John and Susan finished their college degrees at the University of Colorado. John then earned his law degree at the University of Idaho and was admitted into the Idaho State bar in 1974.

John had a fulfilling 40-year legal career in Boise starting as an Ada County deputy prosecutor. From there, he joined the law firm of Risch, Goss, and Insinger and went on to be a successful and well-respected attorney. John served many years as a member, then Chairman, of the Idaho State Bar Professional Conduct Board. He also served as President of the Idaho Fourth District Bar Association and served on the Idaho Housing and Finance Association’s Board of Commissioners.

However, he always made time for Idaho adventures including fishing, hiking, skiing and racing Hobie Cats on the lakes of Idaho. In 1974, the extended Insinger family moved their summer vacation north, to the Boulder Creek Ranch on the east fork of the Salmon River. Fortunately, John was an avid aviator and enjoyed flying family and friends to “the Ranch”, often buzzing the dirt landing strip to clear the cows before landing. When they weren’t sailing, John and Susan and their children spent many, many weekends at the Ranch with grandparents, aunts, uncles, nieces and nephews. He also loved to travel with his wife, Susan, especially in their motor

home journeyed as far north as Haines, Alaska.

Once retired, John joined his long-time law partner, Senator Jim Risch, as his Chief of Staff and enjoyed all the intrigue and camaraderie of part-time life in Washington DC. He enjoyed travel to Africa and the Middle East and meeting many world leaders as a representative of Senator Risch's office.

John is survived by his wife, Susan, son Rob and daughter Tina and grandchildren who loved their "Papa". He will be sorely missed.

Tyra H. Stubbs 1957 – 2024



Tyra ("Teera") Stubbs died on November 24, 2024 due to dementia. Tyra and her parents Dorothy and Chuck Hansen arrived in Boise when Tyra was nine. Tyra and her parents loved Boise, and they backpacked and camped throughout Idaho. Tyra graduated from Capital High in 1975, and then went to Carleton College. After graduating with a B.A. in history in 1979, Tyra moved to Chicago.

Tyra had a close circle of friends from college in Chicago, and one of these friends was Richard "Dick" Stubbs. In 1981, Tyra and Dick were married, moved to Portland, and started law school at Lewis and Clark. Tyra and Dick had their first child, Geoff, in their last year of law school, graduated and moved to Boise.

After passing the Idaho State Bar in 1984, Tyra served a judicial clerkship. She then worked as an attorney for the Idaho Department of Law Enforcement before entering private practice. During her career Tyra conducted civil litigation, handled several trials and argued a number of appeals. Somehow Tyra found time to have a second child, Amanda, in 1988.

In 2005 Tyra was found to have breast cancer, and received chemotherapy and radiation. In 2007, Tyra was competing in the Pole, Pedal, Paddle in Bend, Oregon when she had a bike crash. Tyra sustained a severe traumatic brain injury that disabled her from practicing law. Although Tyra no longer could work, she volunteered her time and cared for her family. Tyra and Dick enjoyed living in Boise and New Meadows.

Tyra is survived by her husband, Dick, her son Geoff Stubbs and his children, and her daughter Amanda Corey and her children. The family also expresses its gratitude for Tyra's devoted friends, including Keith Cambre and Linda Blessinger, and the caregivers who cared for Tyra at Truewood by Merrill in Boise.

Robert L. Brower 1943 – 2024



Robert L. Brower passed away peacefully on Monday, Oct. 14, 2024, at the age of 81 at St. Joseph Regional Medical Center in Lewiston.

Born July 28, 1943, in Ogden, Utah, to parents, Erma and Eldred Brower. He attended school in Rupert, Idaho, graduating in 1961. After graduation, Bob served his country in the National Guard. After his service, Bob enrolled at Carroll College in Helena, Mont., transferred to the University of Idaho for his undergraduate, continued onto the UI College of Law, graduating in 1983 with his Juris Doctorate. Bob was admitted to the Idaho State Bar in 1973.

Bob forged many partnerships, received multiple honors for his Professionalism, Outstanding Service and benevolent Pro Bono work, ultimately retiring from Jones, Brower and Callery in 2017. Besides practicing law, Bob held many key roles including delivering Meals on Wheels, teaching Business Law at Lewis-Clark State College, and attaining the position of Exalted Ruler at the Elks Lodge No. 896.

Bob was revered by family and friends as a stellar father, mentor, golf buddy and fishing partner. He was a kind, understanding person; always happy and ready to help in any way he could and will be missed.

Bob is survived by his wife of 43 years, Shirley; his sister and brother as well as eight grandchildren and 14 great-grandchildren. Bob is preceded in death by his parents, Erma and Eldred Brower; son, Anthony Brower; two brothers, Ray and Dee Brower; and grandson, Cody Shawver.



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2024 Resolution Results											
District		1st	2nd	3rd	4th	5th	6th	7th	OSA*	Totals	
Members eligible to vote		447	229	325	2404	306	210	436	1548	5905	
% of total membership		8%	4%	6%	41%	5%	4%	7%	26%	100%	
Members voting		113	64	76	359	84	64	106	102	968	
% of members voting		25%	28%	23%	15%	27%	30%	24%	7%	16%	
Resolution 24-01	For	79	52	49	280	67	57	85	76	745	85%
Changes to Idaho bar exam	Against	22	8	10	45	14	5	13	16	133	15%
Resolution 24-02	For	56	44	47	209	52	42	59	56	565	64%
IRPC 1.16 Entire file rule	Against	43	13	25	113	31	19	38	31	313	36%
Resolution 24-03	For	64	41	46	221	50	46	60	52	580	63%
License fee increase	Against	46	23	29	123	28	17	37	41	344	37%
Total										2680	

*Out-of-State Active

2024 Resolution Results

STATEWIDE—The Bar membership considered three resolutions during the 2024 resolution process. All three resolutions were passed by the membership. The vote tally is above. The proposed changes to the rules, as approved by the membership, will be submitted to the Idaho Supreme Court for its consideration.

Special thanks to the District Bar Association officers for their assistance with planning the resolution meetings. We appreciated the opportunity to meet with lawyers from around the state to honor lawyers and judges and to discuss the proposed resolutions.

Register for the Lawyer Referral Service Panel When You Complete Your Licensing

STATEWIDE—The Lawyer Referral Service (“LRS”) needs additional panel members! LRS operates as a public service of the Idaho State Bar, and we need attorneys like you to help us help the public. All LRS attorneys are members in good standing with no pending public disciplinary complaints. You can join the panel when you renew your licensing for 2025! Please contact LRS Coordinator, Andrea Getchell, with any questions at agetchell@isb.idaho.gov or 208-334-4500.

Ninth Circuit Court of Appeals Held a Special Sitting in Idaho Falls

STATEWIDE—On October 18, 2024, the Bonneville County Centennial Courtroom was full to capacity for an historic event. For the first time since Idaho was admitted as a judicial district to the Ninth Circuit of the United States Courts in 1890, the Ninth Circuit Court of Appeals held a special sitting at the Bonneville County Courthouse in Idaho Falls to hear oral arguments. The three-judge panel consisted of: Senior Circuit Judge N. Randy Smith, Circuitry Judge Ryan D. Nelson, and Circuit Judge



L-R, Senior Judge N. Randy Smith, Judge Ryan D. Nelson, Judge Danielle J. Forrest. Photo courtesy of Alayne Bean.

Danielle J. Forrest. The judges heard oral arguments for two cases: *Johnson v. Gentry* (Case No. 23-2124) and *USA v. Alizadah Nawai* (Case No. 23-2523). Seventh District Trial Court Administrator’s Office, including TCA Tammie Whyte and Deputy TCA Alayne Bean, worked closely with the Seventh District Field Techs, Bonneville County Staff, and Ninth Circuit Staff to make sure the event was successful.

Stoel Rives Welcomes Newest Partner and Four New Associates



BOISE—Meaghan Nelson has joined Stoel Rives as a corporate partner in the firm’s Boise office from a position as in-house counsel. She handles public company representation, corporate governance, executive compensation and corporate transactions. She earned her J.D. from the University of Illinois College of Law, *summa cum laude*, and earned a B.S. in international affairs with high honors from the Georgia Institute of Technology.



Alaina Harrington joined Stoel Rives as a litigation associate in the firm’s Boise office. She focuses on complex commercial disputes, including cases arising from commercial contracts, business torts, and regulatory issues.

She earned her J.D. from the University of Idaho College of Law, *summa cum laude*, where she was ranked #1 in her class, and earned a B.A. in Spanish from the University of Idaho.



Kali Park joined Stoel Rives as a litigation associate in the firm's Boise office. She advises clients on breach of contract, fiduciary duties, oil and gas disputes, indemnity claims, and workers' compensation issues. She earned her J.D. from Baylor University, *cum laude*, and earned a B.A. in biology and Spanish from Southern Utah University.



Anders Pedersen joined Stoel Rives as a litigation associate in the firm's Boise office. He earned his J.D. from the University of Idaho College of Law, and his J.D. in economic sociology from Southern Methodist University.



Audrey Scholer joined Stoel Rives as a litigation and labor and employment associate in the firm's Boise office. She represents clients in a range of different litigation matters and represents them at mediation and arbitration and assists in settlement negotiations. She earned her J.D. from the University of Idaho College of Law *magna cum laude* and earned her B.S. in psychology from Boise State University.

Idaho Association of Defense Counsel Presents Award to James A. Ford and J. Nick Crawford

STATEWIDE—At the Idaho Association of Defense Counsel's 60th Annual Meeting in McCall, James A. Ford of Elam & Burke-Boise and J. Nick Crawford of Brassey Crawford-Boise were presented with the association's most prestigious award, the Carl P. Burke Award of Excellence in Legal Defense.

James A. Ford ("Jim") was recognized by his peers for his exemplary service and accomplishments in the legal field. Specializing in workers' compensation,



Jim Ford (left) and Matt Walters (right)



Andrew Brassey (left) and Nick Crawford (right)

insurance defense, and civil litigation. Jim's legal prowess and dedication to his clients have earned him well-deserved accolades over the years. He was recently named by Best Lawyers in America as the 2025 Lawyer of the Year in Workers' Compensation.

Jim's accomplishments in the legal field extend beyond the expertise he provides his clients. Jim played a pivotal role in the formation of the Young Lawyers Section of the Idaho State Bar and in the founding of the American Inns of Court in Boise. Jim is also a long-time member of the Idaho Association of Defense Counsel and has served in the association's various leadership roles, including as president from 2001-2002.

J. Nick Crawford's peers noted his professionalism, high standard of ethics, and respect for our legal system. He is considered an excellent trial lawyer by his peers, having tried well over 100 jury trials to verdict, and is well respected amongst the plaintiff and defense bar. Nick's accomplishments in the legal field have earned him many accolades over the years, including induction into the

American College of Trial Lawyers and Litigation Counsel of America. Nick has also shown a deep commitment to professionalism in the practice of law throughout his career. The Idaho State Bar presented Nick with its Professionalism Award in 2019.

Holland & Hart Announces 2025 Partner Elections

BOISE—Holland & Hart LLP is pleased to announce the election of 14 new partners effective January 1, 2025. The two elected to the firm's partnership at the Boise office are Tori Osler and Ben Gibbons.



Tori's practice includes a focus on representing clients in commercial real estate development, real estate finance, and multifamily and affordable housing projects.



Ben is adept at helping design and implement employee benefit plans that are tailored to an organization's specific needs.

Mike French Law, PLLC Opens in Boise



BOISE—Mike French is pleased to announce the opening of her Boise firm, Mike French Law, PLLC. Mike, a graduate of the University of Idaho

College of Law, has practiced in the areas of criminal defense and crisis management for more than a decade. She is currently accepting new cases in state and federal court.

Givens Pursley Welcomes Three New Attorneys

BOISE—Givens Pursley is proud to announce a new partner, Jeff Beelart, and two new associates, Megann Meier and Marcus Waterman.

Givens Pursley is proud to announce that Jeff Beelaert has joined the firm as a

litigation partner. Jeff joins the firm with diverse experience in private practice and as a government lawyer, including distinguished service at the United States Department of Justice in Washington, D.C.. He focuses primarily on environmental, constitutional, and administrative litigation. Jeff is licensed to practice in Idaho, and he teaches administrative law as an adjunct professor at the University of Idaho College of Law.



Megann E. Meier has joined the firm as an associate attorney. Having just completed a two-year clerkship in the Ada County District Court, Megann is now excited to practice across a broad range of areas, including litigation, real estate, land use, and natural resource law. She is licensed to practice in Idaho.



Mr. Waterman spent two years as a federal law clerk for Judge B. Lynn Winmill of the U.S. District Court for the District of Idaho. A fifth-generation Idahoan, Mr. Waterman studied law at the University of Idaho College of Law.

Fifth District Congratulates Judge Brody on His Retirement

FIFTH DISTRICT—Fifth District Judge Jonathan P. Brody, who has served in Minidoka County since his appointment in 2009, was honored on November 22 during a retirement ceremony in Rupert.

Administrative District Judge Eric J. Wildman talked about Judge Brody's judicial career and the time he spent as a prosecutor and public defender for Twin Falls and Minidoka counties. The pair joked about who had technically been a judge longer, and Judge Brody spoke of how supportive the community has been over the years.

The entire Fifth District wishes Judge Brody the very best and congratulates him on his retirement!

Fifth District Celebrates Judge Lindstrom's Investiture

FIFTH DISTRICT—The Fifth Judicial District on Nov. 21 held an investiture ceremony in Burley for Judge Scott P. Lindstrom, sworn in as the newest magistrate judge for Cassia County. In a fitting tribute, the oath was administered by his predecessor, now-District Judge Blaine P. Cannon.

Judge Lindstrom thanked his family, his mentors, and the tremendous support system that he has had in Cassia County that led him to the decision to apply to be a judge. Through remarks peppered with good humor, he said how honored he is to serve his community and that he hopes he can make everyone proud.

On behalf of the entire Fifth District, welcome to the bench Judge Lindstrom!



Judge Brody, left, and Minidoka County Commissioner Schenk. Photo credit: ID Courts.



Judge Cannon, left, administers the oath to Judge Lindstrom. Photo credit: ID Courts.

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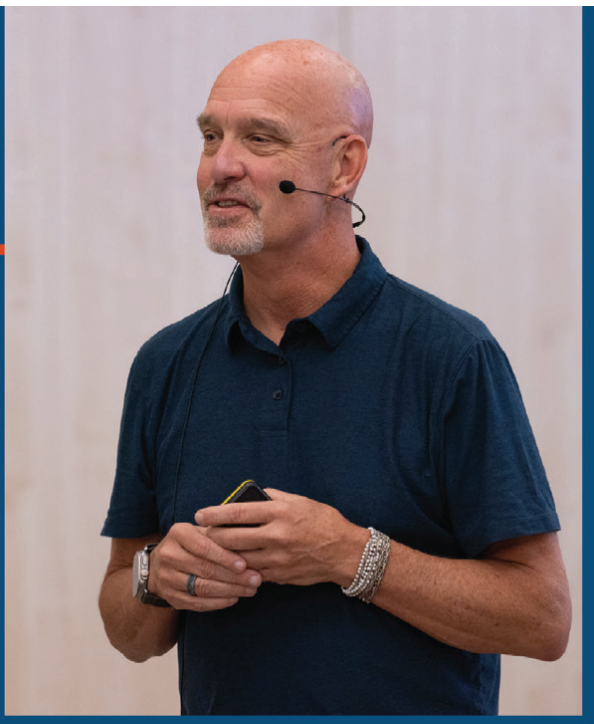
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John R. Kormanik, Esq., is a Certified Professional Coach, and author of Break The Law: A Story of a Reimagined Legal Career and a Reclaimed Life. John coaches attorneys, managing partners and law firm owners who want more success and freedom. Schedule a 30-minute discovery session today.





January

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