



Juelsgaard Intellectual Property and Innovation Clinic

INAUGURAL REPORT

| 2013-2014





PHILLIP R. MALONE

Professor of Law and Director, Juelsgaard Intellectual Property and Innovation Clinic

Phil Malone joined Stanford Law School's faculty in July 2013 as professor of law and as the inaugural director of the Juelsgaard Intellectual Property and Innovation Clinic of the Mills Legal Clinic. A leading expert in IP, innovation and cyberlaw, Malone brings to the position nearly a decade of experience in clinical education and another 20 years of antitrust and technology litigation. He previously was a clinical professor of law and the director of the Cyberlaw Clinic at the Berkman Center for Internet & Society at Harvard Law School. Before joining the academy, Malone was a senior attorney for over two decades with the Antitrust Division of the U.S. Department of Justice (DOJ), where much of his experience focused on high-technology industries, the Internet and computer software and hardware.

From the Director

I have been honored over the past year to join with a talented group of students and a top-notch staff to launch this exciting new clinic at the Mills Legal Clinic at Stanford Law School devoted to understanding and advocating for sound innovation law and policies. We are grateful to Stephen Juelsgaard, JD '82, for his generosity and his appreciation of the nuanced connections between innovation and public policy. Steve's support has provided the opportunity for the next generation of SLS students to become skilled advocates for sound, balanced IP and regulatory policies to encourage innovation and creativity in a variety of tech industries.

During its first year in operation, the clinic's work included amicus briefs to the Supreme Court, Second and Ninth Circuits and a federal district court; a whitepaper to support "net neutrality" comments to the FCC, a public policy guide explaining alternative, innovation-friendly patent licensing practices; advice (jointly with the O&T Clinic) to a large non-profit on its IP policy, strategy and agreements; policy papers relating to the sharing economy and cell-phone kill switches, and counseling individual clients whose anonymity was threatened by a subpoena in a patent lawsuit. Students represented and collaborated with computer science and data security experts, leading antitrust- and IP-law academics, advocates for small innovators and entrepreneurs, and others. They studied effective legal and policy advocacy in weekly seminar meetings and deepened their knowledge through regular discussions with leading outside experts from government, technology companies, venture capital firms, and advocacy organizations. Through this rich set of experiences, our students developed essential practice skills, deep substantive knowledge, and a strong sense of professional identity.

We hope you enjoy the following highlights of our activities from our successful first year.

Phil Malone

DIRECTOR, JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC

JEF PEARLMAN

Clinical Supervising Attorney, Juelsgaard IP Clinic

Jef Pearlman joined the Juelsgaard Intellectual Property and Innovation Clinic as a clinical supervising attorney and lecturer in law in 2014. Jef received his bachelors and masters degrees in computer science from MIT and his J.D. from Stanford Law School, where he represented clients as a student in the Cyberlaw Clinic. After law school, Jef clerked for the Honorable William W Schwarzer on the Northern District of California and, sitting by designation, on the 1st, 6th, and 9th circuits. Jef was then awarded the Bruce Ennis Fellowship for First Amendment Law, which enabled him to advocate for sound IP, technology, and innovation policy as a fellow and staff attorney at the DC-based nonprofit, Public Knowledge. Jef then returned to the Bay Area, where he litigated patent disputes in federal court and at the International Trade Commission and advised clients on issues relating to open source software at Covington & Burling LLP.



Founding

Given Stanford Law School's location in the heart of Silicon Valley—the center of modern innovation in a variety of fields—SLS faculty, alumni, and students saw the importance of creating opportunities for law students to explore the intersection of innovation and IP and other law through hands-on casework and policy analysis. The groundwork for the eleventh clinic under the umbrella of the Mills Legal Clinic was first laid through discussions among faculty and IP/innovation law experts, and made possible through a principal gift from alumnus Stephen Juelsgaard, JD '82. As an attorney who worked in the biotechnology company, Genentech, for more than 20 years, Steve understood the complex relationships between intellectual property and innovation.

Phil Malone, a former senior attorney with the Antitrust Division of the U.S Department of Justice and then Professor of Law and director of the Harvard Law School Cyberlaw Clinic at the Berkman Center for Internet & Society, was the ideal candidate for the inaugural directorship of the new Juelsgaard Intellectual Property and Innovation Clinic at SLS. Phil joined the SLS faculty in July of 2013, and spent the summer and fall quarter developing the Clinic curriculum and cases. He focused on cases and projects that provide an opportunity for students to become skilled advocates for the development and application of intellectual property law and regulatory policies that maximize the underlying goals of those laws and regulations: to promote innovation, creativity and generativity. His selection of matters has focused on complex issues of patent, copyright, trademark, antitrust, privacy, security and other law and regulation in areas ranging from internet and information technology to biotechnology, pharmaceuticals, and the creation and distribution of information. The Juelsgaard Clinic was formally launched in the winter 2014 quarter with a full team of eight students and a core mission of fostering innovation by advancing a regulatory climate that is appropriately sensitive to the ways in which law—whether through litigation, legislation, or regulation—can serve to promote (or frustrate) the inventiveness, creativity, and entrepreneurship that provide the real engine for economic growth.



"We founded the Juelsgaard Clinic to try to get beyond tired pro-IP, anti-IP debates and take a nuanced, industry-specific view of IP and other regulations affecting innovation. Under Phil Malone's direction, the clinic has done just that, weighing in in cases ranging from pharmaceutical antitrust to software patents with knowledge and sensitivity to the special characteristics of each industry. I have been privileged to work with the clinic both as an advisor and as one of their clients, and I can attest that their work is first rate."

MARK A. LEMLEY

William H. Neukom Professor of Law
Director, Stanford Program in Law, Science and Technology

Mills Legal Clinic

Overview of Clinical Education at Stanford Law School



Founded in 2005, the Mills Legal Clinic serves as the umbrella organization for all eleven clinics at Stanford Law School, including the Religious Liberty Clinic. These programs provide in-depth, hands-on learning opportunities for students at the law school. Students enrolled in one of the clinics spend a full academic quarter working on live cases with real clients, under the supervision and guidance of experienced faculty and staff attorneys. In addition to incubating tomorrow's public service, public interest, and pro bono lawyers, the clinics are a training ground for future lawyers, whatever their career aspirations—whether to join a large law firm, become entrepreneurs, make policy, or engage in public service. It is a vital part of Stanford's mission to prepare every student for the challenges, responsibilities, and rewards of a career as a legal professional.



"Under Phil Malone's mentorship, students in the Juelsgaard Clinic represent clients who are stakeholders in some of the most exciting technology and innovation issues of our time. Students are immersed in challenging IP, privacy, antitrust and other regulatory areas as they develop the knowledge and skills they need to be effective advocates in this fast-evolving environment. There is no better place than Stanford Law School, here in the heart of Silicon Valley, for students to become thoughtful and informed lawyers in this arena."

JULIET M. BRODIE

Associate Dean of Clinical Education and Director of the Mills Legal Clinic and Community Law Clinic

In addition to the Juelsgaard Intellectual Property and Innovation Clinic, there are currently ten other clinical programs at the Mills Legal Clinic, covering a broad range of legal activities:

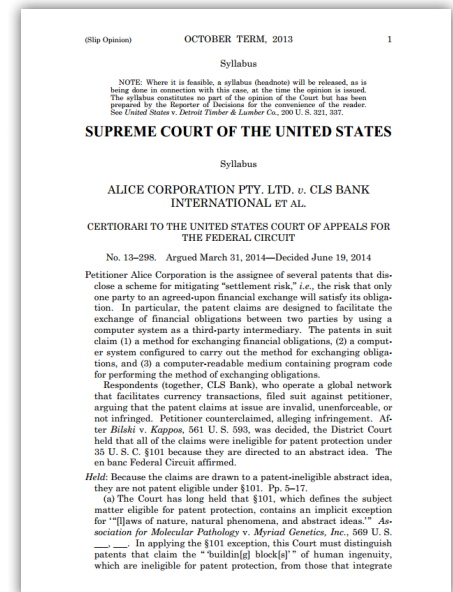
- Community Law Clinic
- Criminal Defense Clinic
- Criminal Prosecution Clinic
- Environmental Law Clinic
- Immigrants' Rights Clinic
- International Human Rights and Conflict Resolution Clinic
- Organizations and Transactions Clinic
- Religious Liberty Clinic
- Supreme Court Litigation Clinic
- Youth and Education Law Project

Clinic Cases

A brief summary of some of the Clinic's major cases and accomplishments in its first year include:

Clinic Argues Against Overbroad Patents in U.S. Supreme Court

Michael Chen, JD '14, and Rachel Yu, JD '14, co-authored the Juelsgaard Clinic's first Supreme Court *amicus curiae* brief, with the Computer & Communications Industry Association (CCIA), in one of the most important U.S. Supreme Court cases in recent history addressing patents, *Alice Corporation Pty. Ltd. v. CLS Bank International (CLS Bank)*. CLS Bank examined whether a scheme for mitigating risk in financial transactions through the use of a third party intermediary was patentable when (and because) a computer was used as the third party. The clinic's and CCIA's amicus brief urged the Court to protect innovators from harmful, overbroad patents. The brief argued that software not tied to particular hardware was unpatentable because it represents an "abstract idea" that is ineligible for patent protection and because it constitutes impermissible "functional claiming." The brief expressed particular concern that providing protection for the types of patents at issue would enable patent-owners to preempt all ways of implementing an idea, regardless of whether the patent-owner had actually invented them.



Juelsgaard Clinic Seminar Meeting



"The Juelsgaard Clinic helped my classmates and me get involved in the center of the network neutrality debate. We worked with Engine, an SF-based organization that advocates for startups. Our project had just begun when Chairman Wheeler announced his plan to propose new rules that would harm innovation online. From that point on our work changed, sometimes daily, as new facts emerged and the political environment evolved—at one point, we even helped Engine respond when the Chairman himself wrote them a public letter. The JIPIC made it possible for us to get first-hand experience working for the public interest in the rapidly changing area of technology policy, an experience I feel fortunate to have had while still in school."

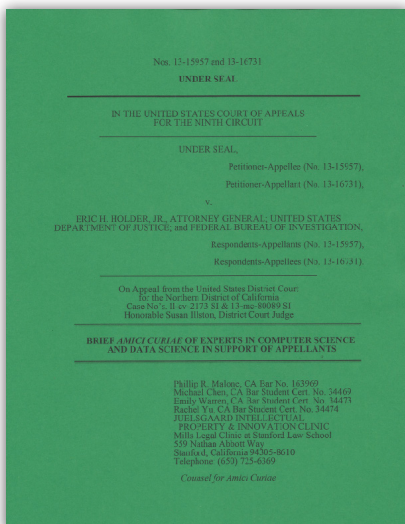
Anna Sallstrom, JD '14

Clinic Supports Innovators and Entrepreneurs in Net Neutrality Rulemaking

Spring quarter students Jack Donahoe, JD '14, Jaryn Fields, JD '15, and Anna Sallstrom, JD '14, represented Engine, a nonprofit that works to support innovators and technology, in its analysis of and advocacy regarding proposed Federal Communications Commission rules concerning network neutrality. Jack, Jaryn and Anna prepared a whitepaper analyzing and explaining the source and scope of the powers the FCC has to protect net neutrality and why a truly open Internet is essential for innovation, startups and entrepreneurs. The clinic's work on this issue coincided with an intense period of public and industry engagement with the net neutrality issue and more than four million comments to the FCC concerning its proposed rules.

Clinic Represents Leading Computer Science and Data Security Experts

Michael Chen, JD '14, Emily Warren, JD '15, and Rachel Yu, JD '14 prepared and submitted two amicus briefs to the Ninth Circuit on behalf of 20 of the nation's leading expert professors of computer and data science specializing in data and computer security, data analysis, cryptography, and privacy-enhancing technologies. The briefs were submitted in an appeal of several challenges to the constitutionality of statutes granting the FBI the authority to issue, without prior judicial approval, National Security Letters to compel the disclosure of all non-content data connected with phone calls, text messages, and emails—essentially, all forms of communication records with the exception of actual recordings and copies of the contents of the messages themselves. Michael, Emily, and Rachel conducted extensive research and worked closely with experts to develop and articulate a compelling picture of how so-called "metadata," information about a communication, can be extremely revealing even when it does not include the actual content of the correspondence.

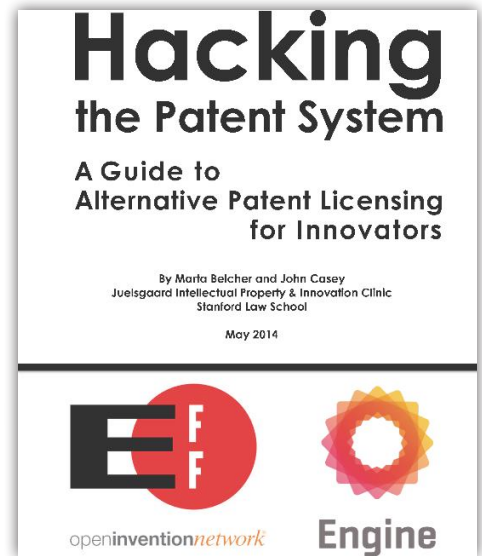


The clinic's brief emphasized for the Court the extraordinary sensitivity of the "non-content" data that can be gathered and the private information that can be revealed by such data, including extensive information about a person's political contributions, intimate relationships, religious and community affiliations, medical conditions, financial records, and much more. The brief also provided the expert clients' explanations of how the rise of "Big Data" and sophisticated analytical tools only compound this danger, giving the government unprecedented access to the sensitive information of American citizens.

Clinic Provides Alternative Patent Guidance to Innovators and Inventors

Marta Belcher, JD '15, and John Casey, JD '15, developed "Hacking the Patent System: A Guide to Alternative Patent Licensing for Innovators." In collaboration with our clients, Electronic Frontier Foundation, Engine Advocacy, and the Open Invention Network, our students researched, drafted, and coordinated the guide, which is designed to help startups and innovators understand and consider using non-traditional approaches to patent licensing.

The goal of the U.S. patent system is to incentivize innovation, but there is growing concern that the way the current system operates at times and in some contexts does more to hinder innovation than to promote it. "Hacking the Patent System" lays out three approaches to patent licenses that innovators can use to reduce the negative impact of the patent system on innovation: defensive patent aggregators, patent pledges, and Google's License on Transfer Agreement. The guide identifies specific entities and licenses making use of each approach and explains the pros and cons for innovators associated with each. In May, the clinic's clients officially launched the guide, which serves as a valuable tool for startups and tech companies as they learn about and consider using these and other alternative patent licensing structures.



"The group discussions with attorney visitors at the Juelsgaard Intellectual Property and Innovation Clinic were very meaningful. They taught us about the factors that patent and copyright law and innovation policy should incentivize to create groundbreaking innovation. The amicus brief I wrote helped me learn that defining innovation too broadly and then protecting it too closely can actually stifle future improvements by other inventors working off the pioneer inventor's contribution."

Vikram Iyengar, JD '15

(PHOTO: MATT RIETFORS, JD '15, WITH VIKRAM IYENGAR, JD '15)

Clinic Tells Court How Antitrust Scrutiny Can Protect Generic Drug Competition

Students Vikram Iyengar, JD '15, and Matt Rietfors, JD '15, submitted an amicus curiae brief in a pharmaceutical antitrust case in the Eastern District of Pennsylvania, *Mylan v. Warner Chilcott*. The brief articulated the amici's view of the proper legal standard for determining whether so-called pharmaceutical "product-hopping" constitutes anticompetitive conduct under the Sherman Act within the complex regulatory structure of the Hatch-Waxman Act. Product-hopping is a strategy whereby branded drug manufacturers make non-substantial changes to their drugs in order to trigger delays in the substitution of generic drugs and thereby delay generic entry.

The Clinic's clients were almost all of the leading scholarly experts on the application of IP and antitrust law in regulated industries; they included the co-authors of the seminal treatises on antitrust law and on IP and antitrust, as well as authors of the primary academic articles analyzing product-hopping and other anticompetitive conduct in the context of Hatch-Waxman. The brief explained that antitrust law is an appropriate means to protect Hatch-Waxman's carefully crafted statutory scheme—a scheme designed by Congress specifically to promote generic competition—from predatory regulatory gaming behavior that can produce anticompetitive harm; stifle innovation; and raise drug prices for consumers, the government, and third-party payers.



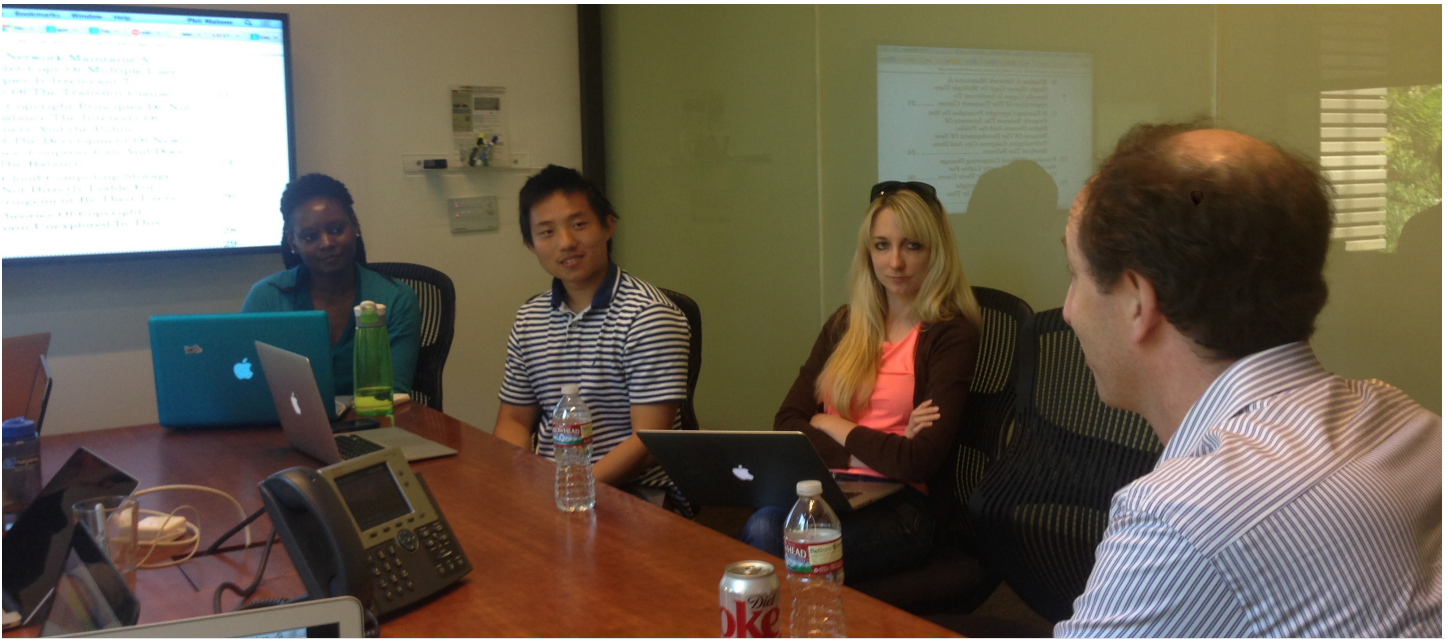
Juelsgaard Clinic students: Rachel Kimball Wilcox (left), Yale Fu (third from left), and Jaryn Fields (fourth from left), with Organizations and Transactions Clinic students Denise Ballesteros and Kaleisha Stuart (all students from the Class of 2015).

Clinic Provides IP Policy Guidance to Major Educational Nonprofit

Spring quarter clinic students Jaryn Fields, JD '15, Yale Fu, JD '15, and Rachel Kimball Wilcox, JD '15, collaborated with students in the SLS Organizations and Transactions Clinic to represent the New Teacher Center (NTC) in assessing and developing effective intellectual property policies to further its mission. NTC is a national nonprofit dedicated to improving student learning through programs to accelerate the effectiveness of new teachers and school leaders. As NTC increasingly shifts to an emphasis on online materials, services and collaboration platforms for its work, its intellectual property needs and priorities are shifting as well. In this joint representation, Juelsgaard students provided NTC with a forward-looking IP policy and strategy guide to help NTC as it grows and evolves. The clinic also created an operational toolkit for NTC to aid with recurring intellectual property issues ranging from requests to reuse NTC content to sharing videos on NTC's collaboration platform, and drafted portions of a new NTC Terms of Service.

Representative Examples of Other Projects and Cases

- Drafted portions of an amicus brief in the Second Circuit in the *Capitol Records v. Vimeo* appeal to protect the role the Digital Millennium Copyright Act (DMCA) plays in ensuring an innovative and creative internet. The brief advocated for a sensible construction of “red flag” knowledge under the DMCA and for a determination that the DMCA's safe harbors apply to all sound recordings, including those from before 1972, the only interpretations that make sense in light of, and give full effect to, Congress's intent in passing the DMCA. Co-authored with the Organization for Transformative Works, EFF, CDT, Public Knowledge, and New Media Rights.
- Counseled individual donors to the Electronic Frontier Foundation's “Save Podcasting” campaign whose First Amendment rights of association and online anonymity were threatened by a subpoena from a patent assertion entity in separate patent litigation involving podcasting.
- Collaborated and strategized with the Supreme Court Litigation Clinic on technical aspects of its appeal in *Riley v. California*, a case challenging the ability of police to search the contents of smart phones without a warrant upon arrest. The Supreme Court ruled unanimously for broad protection of digital privacy, requiring search warrants for such searches because of the vast amounts and types of personal information contained on modern devices.
- Detailed policy analysis regarding possible regulatory approaches to the so-called “sharing economy,” highly innovative and disruptive businesses in the transportation (Uber, Lyft, Sidecar), lodging (airbnb), payment (Square) and other industries.
- Technical, legal and policy assessments and analysis for a client regarding the implications of so-called cell phone “kill switches. The analysis examined the complex and delicate interplay between the interests of public safety and deterring theft, on the one hand, and slowing innovation and creating safety and security risks, on the other hand.



Juelsgaard Clinic students Jaryn Fields, JD '15, Yale Fu, JD '15, and Rachel Kimball Wilcox, JD '15, discuss international copyright developments and challenges with Tom Rubin, JD '88, head of global intellectual property strategy for Microsoft.

Events

Speaking Truth to Patents: The Case for a Better Patent System - June 26, 2014

The Juelsgaard Intellectual Property and Innovation Clinic co-sponsored a speech by The Honorable Michelle K. Lee (above photo), Deputy Director and Acting Head, U.S. Patent and Trademark Office. Lee addressed many of the issues regarding the relationship between patents and innovation on which the Juelsgaard Clinic focuses and highlighted the balancing of interests that sound policy requires.

Co-Sponsored By:

- **SLS Juelsgaard Intellectual Property and Innovation Clinic**
- **Stanford Program in Law, Science & Technology**
- **Silicon Valley IP Law Association**
- **Stanford Law School**



Events (continued)

danah boyd

Join danah boyd as she shares insights from her research and signs copies of her new book. *It's Complicated* is essential reading not only for parents, teachers and others who work with teens but also for anyone interested in the impact of emerging technologies on society, culture and commerce in years to come.

danah boyd is a Principal Researcher at Microsoft Research, a Research Assistant Professor in Media, Culture, and Communication at New York University, and a Fellow at Harvard's Berkman Center. Her research examines social media, youth practices, tensions between public and private, social network sites, and other intersections between technology and society, focusing especially on how young people use social media as part of their everyday practices.

It's Complicated
the social lives of networked teens

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sts | the program in science, technology, and society

Tuesday, April 22, 2014
5:00 pm
Stanford Law School
Crown Building Room 190

This is a free event, but reservations are required.
RSVP to Lynda Johnston,
ljohnst@stanford.edu.
Food will be provided.

Guest Speaker Event: Danah Boyd - April 22, 2014

Danah Boyd, author of *It's Complicated: The Social Lives of Networked Teens* shared insights from her research on the impact of emerging technologies on society, culture, and commerce in years to come.

Co-sponsored by:

- **SLS Juelsgaard Intellectual Property and Innovation Clinic**
- **The Stanford Human-Computer Interaction Group**
- **The Program in Science, Technology, and Society**

Event: Workshop on Understanding Innovation - March 24, 2014

The Gruter Institute for Law and Behavioral Research and the Juelsgaard Intellectual Property and Innovation Clinic collaborated to convene a one-day workshop of approximately 15 invited participants from across a disciplinary spectrum to engage in an exchange of knowledge with respect to the central question of understanding innovation. They examined innovation across various complex systems, including biology, economics, law, and technology.

GRUTER INSTITUTE FOR
LAW AND BEHAVIORAL RESEARCH

and
MillsLegalClinic
Stanford Law School

Juelsgaard Intellectual Property
and Innovation Clinic

**Workshop on
Understanding Innovation**
With the support of the

Ewing Marion
KAUFFMAN
Foundation

MARCH 24, 2014
Stanford Law School
Neukom Building, Room N102
555 Nathan Abbott Way
Stanford University
Palo Alto, California

"Phil Malone and the Juelsgaard Clinic have filled an essential need in submitting amicus briefs on pharmaceutical issues. I have worked with them on two complicated cases involving "product hopping," in which a drug company switches from one version of a drug to another, typically with little reason for the change other than to stifle generic competition. This is a challenging issue that implicates patent law, antitrust law, the Hatch-Waxman Act, and state substitution laws. The clinic produced impressive briefs in these cases, revealing a nuanced understanding of the regulatory framework while offering a blueprint for courts to recognize the harm from the behavior."

Michael A. Carrier
Distinguished Professor, Rutgers Law School



Juelsgaard Clinic director, Phil Malone, in conversation with U.S. Patent & Trademark Office acting director, Michelle Lee.

2013-2014 Student Enrollment - Juelsgaard Intellectual Property and Innovation Clinic

22 Applications for Enrollment
15 Students Enrolled

2014 WINTER QUARTER

8 Students Enrolled

2014 SPRING QUARTER

7 Students Enrolled



"Clinic provided me with an opportunity to learn the skills I need to build good professional judgment. When building a case or crafting arguments for a brief, I realized that there are so many paths you can take I became accustomed to the many uncertainties that come with practicing law—not just learning about the law."

Kassoni Scales, JD '14



"My Juelsgaard Intellectual Property and Innovation Clinic experience was very worthwhile. From discussing cutting-edge policy issues with industry leaders to drafting briefs and whitepapers on the front lines of policy development, our clinic made an impact in advocating for sound innovation policy in the public interest. In one case with wide-reaching precedential implications, I helped draft an amicus curiae brief on what the court had called a "novel" technological issue. On another project, I helped write a foundational whitepaper on a major legislative proposal with the goal of bringing together decision-makers for well-informed debate. Learning through doing on such critical issues while interacting with real-world experts was exactly what I hoped for in taking a clinic." **Matthew Rietfors, JD '15**

SLS