



KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS KERNOCHAN CENTER NEWS

COLUMBIA UNIVERSITY SCHOOL OF LAW

FALL 2004

Professor Diane Zimmerman Delivers Horace S. Manges Lecture

On March 29, 2004, Diane Leenheer Zimmerman ('76), Samuel Tilden Professor of Law at New York University School of Law, delivered the seventeenth Horace S. Manges Lecture, titled "It's an Original! (?): In Pursuit of Copyright's Elusive Essence."

Professor Zimmerman opened her lecture with a discussion of the 1991 U.S. Supreme Court case of *Feist Publications v. Rural Telephone Service Co.* In *Feist*, the Supreme Court held that the white pages telephone directory was not copyrightable. Copyright applies only to original works of authorship; because the telephone directory consisted purely of conventionally arranged factual information, it could not be considered original. The *Feist* court stated that even parts of a work that are original and authored in the traditional sense – they have not been copied from someone else's work – may still fail the originality requirement for lack of creativity. Zimmerman posed the question: "What is that something extra that *Feist* demands as creativity?" According to the *Feist* court there must be some manifestation of thought; arranging names alphabetically with their corresponding phone numbers was too "inevitable" a presentation to meet the originality requirement.

"*Feist*'s originality requirement caused quite a stir in the copyright community," Zimmerman recalled. "Lower courts have struggled with how to apply the creativity standard, some *de facto* ignoring it and in other cases inventing clever standards. The problem, I would suggest, is that once the court opened the door to a reinvigorated originality standard in *Feist* – and I think that's what they did – it got a little frightened by what it found standing on the other side of the door. What I think the court sensed looming in its sights was

a very different question, and that is 'What is the objective of copyright law? Why do we actually have it?'"

In answering this question, Zimmerman discussed

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Lynn Saville

From left to right: Margo Crespín, Esq., Assistant Director, Kernochan Center, Professor Jane Ginsburg, Co-director, Kernochan Center, Professor Diane Zimmerman '76, and June Besek, Esq., Executive Director, Kernochan Center.

Spotlight on Visiting Professors Clarisa Long and Tim Wu

Columbia Law School and the Kernochan Center for Law, Media and the Arts welcome Clarisa Long and Tim Wu as Visiting Professors this Fall. Long and Wu, both from the University of Virginia School of Law, are teaching intellectual property law classes and conducting scholarly research at Columbia.

Clarisa Long is teaching Trademarks and Patents this semester. An Associate Professor of Law since 1999, Long joined Virginia's faculty following a research fellowship at Harvard University. She graduated from Stanford Law School in 1994, where she was the Jane A. Sharp Scholar and the Walter J. Coleman Scholar. After law school, Long clerked for Judge Alvin A. Schall of the United States Court of Appeals for the Federal Circuit and worked as an associate with Wiley, Rein & Fielding in Washington, D.C. She graduated with a B.S. in molecular biology and a B.A. in economics from the University of Illinois in 1989.

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Please Join Us For

Metamorphosis of Artists' Rights in the Digital Age

Friday, October 29, 2004, 9:30-5:00

Columbia Law School, Jerome Greene Hall

Professor Graeme Austin will deliver the keynote address. Panels will discuss:

- Contracting and Bargaining from the Author's Perspective
- Attribution and Integrity Issues
- New Issues in Authors' Rights

For more information visit:

<http://www.columbia.edu/cu/jla/symposium.html>

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cases leading up to *Feist* and issues she believes the case raises for the future. During the 19th century, Zimmerman explained, some courts treated eligibility for copyright as a matter that was to be determined through a qualitative test whose threshold of merit varied from court to court. Zimmerman described the 1884 case of *Burrow-Giles Lithographic Society v. Sarony* in which the court used qualitative factors – including the pose of the figure and the lighting – to determine that a photograph of Oscar Wilde constituted a copyrightable “writing.” The court emphasized the originality in authorship and noted that where photographs reflected qualities of intellectual production and thought, they could be protected.

Other courts referred to the preamble of the Constitution’s copyright clause, and asked whether the work contributed to science and the useful arts in promoting learning. Using this analysis, earlier courts refused to give copyright protection to advertisements or illustrations, for example. She noted that reliance on the preamble test petered out in the 20th century. Congress expanded the categories of copyrightable subject matter to include “all the writings of an author,” and courts began to rely on the originality requirement rather than on the preamble.

At the beginning of the 20th century, Zimmerman asserted, “the inquiry into originality took quite a different turn.” Most notably, Justice Holmes’ decision in the *Bleistein v. Donaldson Lithographing* case of 1903, which involved the reproduction of three chromolithograph circus posters, epitomized the shift away from qualitative analysis of a work’s originality. Justice Holmes declared, “it would be a dangerous undertaking for persons trained only in the law to constitute themselves the final judges of the worth of pictorial illustrations outside the narrowest and most obvious limits.” Holmes explained that in order to be a copyrightable writing, “a work must be original, but that simply means that it must express something of an author’s personality. . . .” Later courts reduced the concept of originality to mean “not copied.” With such a low threshold, Zimmerman explained, courts began routinely to find works met the originality requirement. She queried, “Why do we invest so heavily in providing legal protection to so much drivel?” In the past, when perfecting one’s copyright required more effort, Zimmerman claimed, the notice, registration, deposit and renewal requirements served to effect some “valuable rough sorting.” She voiced her concern that now that copyright lasts for the life of the author plus 70 years, works of little value to society may be protected unnecessarily.

In conclusion, Zimmerman returned to her analysis of the *Feist* case and argued that requiring a higher bar for originality makes sense in light of the First Amendment. While acknowledging that it would be challenging to make qualitative judgments with regard to originality, she contended that because copyright is subject to constitutional constraints, it is important that works receiving copyright “rise above the trite

and mundane.”

Zimmerman’s lecture sparked lively, and occasionally indignant, questions from audience members, several of whom challenged her proposal to allow courts and/or Congress to impose qualitative judgments to determine which works are eligible for copyright protection.

Professor Zimmerman is the author of numerous articles and publications. Her Manges Lecture will be published in the next issue of the *Columbia Journal of Law & the Arts*. The Horace S. Manges Lecture & Conference fund was established by the law firm of Weil, Gotshal & Manges in 1986 in memory of its esteemed partner Horace S. Manges (’19).

Students Extol Their Arts Law Summer Internships

Seven Columbia Law School students took part in the arts law summer internship program sponsored by the Kernochan Center, with the generous support of the Joseph Solomon Internship Fund, the John F. Wharton Internship Fund, and the Robert Blumofe estate. The students spent the summer working in the legal department of arts and media related organizations.

The students, all from the class of ‘06, and the organizations with which they interned were: Todd S. Keithley, National Public Radio (NPR) in Washington D.C.; Sidne Koenigsberg, The New York Public Library; Heejae Chang, KCET in Los Angeles; Matthew Batters, International Foundation for Art Research (IFAR); Sarah Griffin, the San Francisco City Attorney’s Office; Piotr Kietlinski, Lincoln Center for the Performing Arts; and Rosemary Spaziani, WNET/Channel 13 in New York.

Todd Keithley was enthusiastic about his summer at NPR. “NPR’s lawyers could not have been more friendly or welcoming,” he explained. “They assigned substantive work and always had time for questions. My various projects touched on defamation and First Amendment law, labor and employment, real estate, contracts, and FCC regulations. I sat in on meetings, saw an arbitration in action, and watched a broadcast of *All Things Considered*.”

“Working at IFAR over the summer was a great experience,” said Matthew Batters of his internship. “My pro-

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Spotlight on Visiting Professors Clarisa Long and Tim Wu

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Long's research interests include intellectual property law and theory, the economics of information, property theory, and contract theory. She is the author of numerous law review articles, most recently "Information Costs in Patent and Copyright," 90 *Va. L. Rev.* 465 (2004) and "Patent Signals," 69 *U. Chi. L. Rev.* 625 (2002). She is also the editor of two books, *Intellectual Property Rights in Emerging Markets* (2000) and *Genetic Testing and the Use of Information* (1999).

Long is currently working on several scholarly papers. One examines the controversial trademark doctrine of dilution "from both a theoretical and an empirical perspective, asking what the benefits and harms of dilution law are in theory and comparing those with what we actually see going on in practice." In another paper, she is exploring what she calls "thingness" in intellectual property. "In this conceptual paper," she explains, "I look at how intellectual property rules can make it easier or more difficult to comprehend the attributes and boundaries of the intangible things that are the subject matter of intellectual property rights."

Tim Wu is teaching Copyright and a seminar on Advanced Intellectual Property Law at Columbia this semester. According to Wu, his seminar "is designed for the aficionados, the true IP obsessives, they know who they are. They get excited about new patents and find the idea of ownership of intangible goods deeply interesting." The seminar covers a variety of topics, including the history of copyright, tensions between copyright and the First Amendment, peer-to-peer file sharing, and digital rights management.

Wu graduated with First Class Honors from McGill University in 1995 and *magna cum laude* from Harvard Law School in 1998. His interest in intellectual property grew out of his scientific and technological background. A biochemistry major at McGill, Wu worked through college as a computer programmer. While in law school, he became interested in relevant connections between science, computers and the law. After graduating from law school, Wu clerked for Chief Judge Richard Posner of the Seventh Circuit Court of Appeals, and Justice Stephen Breyer of the Supreme Court of the United States. Prior to entering academia, he worked in the telecommunications industry. During this period, Wu "saw how the laws affected the companies' behavior, the industry and international business."

Wu's research focuses on the intersection of international, copyright, and telecommunications law. He is currently working on two papers. The first, "Copyright's Communications Policy," suggests that communications policies influenced the development of rules in copyright law. The second paper, "Copyright's Authorship Policy," argues that copyright should pay more attention to authors, as opposed to publishers and disseminators. Wu is also writing a book, expected to be published next summer, which tells the story of "the Internet's first collision with law, and the future of the Internet and the nation state."



Clarisa Long and Tim Wu, visiting Intellectual Property Professors.

Wu welcomes the opportunity to be in New York with its dynamic artistic community. "In the short time I've been here," he recounted, "I've already met writers, composers, theater people — people whose livelihoods are affected strongly by the laws we study. It's a good way to get an idea of the people whom the copyright law is supposed to speak to."

Students Extol Their Arts

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jects exposed me to international art cases and disputes. I was also able to write for the Foundation's journal on the duty owed to 'special clients' of auction houses in light of an English court decision against Christie's London."

"My experience at Lincoln Center was fantastic," raved Piotr Kiełtłinski. "As the legal intern, I was in the unique position of simultaneously working for a non-profit, a general counsel's office, and a performing arts organization. As a result, I was able to work on a wide assortment of projects involving diverse areas of the law including contracts, copyright, trademarks, and tax."

Sarah Griffin said of her summer internship: "At the San Francisco City Attorney's Office, I worked closely with deputy city attorney Adine Varah, a Columbia Law School graduate who currently counsels the City's various museums and cultural institutions. My two main projects focused on charitable gift restrictions and litigation in probate court, but I also researched a number of First Amendment issues, drafted contracts and ordinances, and sat in on numerous client meetings."

Rosemary Spaziani expressed her appreciation for the opportunity to intern at WNET/Channel Thirteen this summer, reporting that "I gained valuable experience and exposure to entertainment law and also the daily routine within a general counsel's office." "I thoroughly enjoyed the experience," she added.

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Students Extol Their Arts Law Summer Internships



Left to right: Sarah Griffin, Sidne Koenigsberg, Matthew Batters, Piotr Kietlinski, and Rosemary Spaziani (all '06). Not pictured: Heejae Chang ('06) and Todd S. Keithley ('06).

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Describing her summer internship at the New York Public Library as “wonderful,” Sidne Koenigsberg discussed some of its highlights: “In addition to the research and writing experience, I enjoyed attending meetings with counsel from several other New York cultural institutions, including WNET, the Metropolitan Museum of Art and the Museum of Modern Art. I would recommend the experience to other students interested in arts law and the nonprofit sector.”

“I was very satisfied with my summer experience,”

said Heejae Chang of her internship at KCET. She explained that the television station “has a small legal department which gave me many excellent opportunities to gain hands-on experience.” She described her summer as both “enjoyable” and “educational,” explaining, “I worked on a number of research projects and helped the Director of Legal and Business Affairs and Rights and Clearances Manager with day-to-day operations of the station.” Chang added, “It was interesting to work on the shows I hear and watch daily.”

Every year, the Kernochan Center sponsors summer internships placing first and second year students in the legal departments of arts and media-related organizations. Available internships vary from year to year with the needs and circumstances of the participating organizations. In past summers, students interned with legal departments of the Metropolitan Museum of Art, the Dramatists Guild, the Audubon Society, and the Museum of Modern Art. NPR is the most recent addition to the participating organizations.

First and second year J.D. students interested in applying for arts and media related summer internships should submit a resume and cover letter, addressed to Margo Crespin, Assistant Director of the Kernochan Center for Law, Media and the Arts, Box A-17, and sign up for an informational interview with her, by November 3rd. Sign-up sheets will be posted on her office door, Room 737, in October. A brown bag lunch will be held on Thursday, October 21st, from 12:30-1:30 in Room 502 of Jerome Greene Hall, at which this summer’s interns will discuss their experiences and answer questions.