

KERNOCHAN CENTER

FOR LAW, MEDIA AND THE ARTS

Summer 2013

U.S. REGISTER OF COPYRIGHTS GIVES 2013 MANGES LECTURE

By Idara Udofia '13

Maria Pallante, the 12th U.S. Register of Copyrights, delivered the 26th Annual Horace S. Manges Lecture on March 4. The title of her lecture was "The Next Great Copyright Act."

Pallante began her talk with a brief summary of the current Act's history, including substantive challenges and political tensions, as well as amendments that have changed its scope. She identified some of the most prominent controversies that have arisen over the years, such as the length of the copyright term, fair use, and statutory exceptions.

Discussing recent adjustments to the Copyright Act, Pallante provided examples which demonstrated that Congress has consistently deliberated copyright policy and has accordingly adjusted copyright law.

She contended that these continual adjustments over the last 15 years indicate the need for a comprehensive overhaul of the Copyright Act. In further support of her claim, Pallante cited

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Maria Pallante, U.S. Register of Copyrights, launched "The Next Great Copyright Act" at the 26th Annual Manges Lecture

KERNOCHAN CENTER PRESENTS SYMPOSIUM ON SECTION 108 REFORM

On February 8, the Kernochan Center, in co-operation with the U.S. Copyright Office, hosted the Center's 2012-2013 Symposium, "Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform."

Library and copyright experts gathered at Columbia Law School from across the country to examine the value of effective copyright exceptions for libraries and archives, while also exploring the challenges and potential solutions to section 108 reform.

Panel 1 – The Legal Landscape

Maria Pallante, U.S. Register of Copyrights, began the first panel with a statement about section 108 reform, affirming the critical importance of libraries, archives, and museums in the copyright regime.

"Without these institutions and the professionals they employ, scores of creative works would not find an audience. Books, music, letters, films and

other essential documents of our civilization would be uncollected and unorganized, or both, and people who may not have the means to purchase cultural materials would not be able to participate in our democracy," she began.

"It is because of this centrality to the diffusion of knowledge that libraries and archives currently enjoy an exception in the copyright law," Pallante continued.

The panel generally agreed that the specificity of section 108 was valuable because it provided more clarity and reliability than fair use; however, some of the panelists argued that section 108 is outdated and should be changed.

Members of the Section 108 Study Group, which was constituted to assess whether the exception was adequately meeting the needs of archives, libraries, copyright holders and the public in the current digital environment, shared their legislative recommendations regarding amendments to the exception and their

thoughts on whether commercial availability of a work should influence the application of section 108.

Shira Perlmutter, Chief Policy Officer and Director for International Affairs at the USPTO, said that fair use is a fundamental underpinning of the balance in copyright law and a doctrine "of great beauty and of great weakness." The beauty is its flexibility and the fact that it has survived for more than a century in fairly good shape. The weakness is its uncertainty and its unpredictability.

Professor Jane C. Ginsburg, the Faculty Director of the Kernochan Center, discussed the legal challenges with orphan works and mass digitization from an international perspective.

Panel 2 - Section 108 Issues Other Than Mass Digitization

The second panel identified practical problems with section 108 and explored whether it makes sense in the current

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political environment to seek legislative changes to the exception.

Mary Minow, Dominican University's Follett Chair in the Graduate School of Library and Information Science, listed some of the challenges that arise when works cannot be digitized, such as replacing content, interlibrary loans, and the risk of libraries losing comprehensive collections, which in turn jeopardize libraries' future value and ability to preserve and share information.

Eric Schwartz, of Mitchell Silberberg & Knupp LLP, agreed that the ultimate goal for libraries is to preserve material for the historical record which are fundamental to future generations. He suggested that the best way to address the shortcomings of section 108 is to utilize alternative solutions such as private agreements.

Other panelists echoed the notion that it will be hard to form a consensus regarding section 108 reform since reform is unlikely to adequately address the needs of the diverse individual sectors that would rely on section 108.

Attorney Jonathan Band argued that legislative reform is not a good idea from a political point of view. He strongly feels that reform would be counterproductive, and it would be impossible to reach any kind of agreement due to the variety of complex issues. "As complicated as section 108 is now," Band said, "it could be worse or more complicated for libraries [if reformed]."

Mark Seeley of Elsevier acknowledged that the transition from print to digital has not been smooth. He said even though some say that the debate is insoluble, discussion is essential. Since Elsevier publishes for the research and academic communities, its primary interest in the debates and discussion about section 108 is to ensure a continuing market even in the academic and research areas to support investments and engagement opportunities. He suggested more focus be directed to sector specific issues.

Panel 3 - To What Extent Should Libraries be Permitted to Engage in Mass Digitization of Published Works, and for What Purposes?

During the third panel of the symposium, all of the

speakers agreed that mass digitization provided a societal benefit that is worthy of pursuing. Some of the panelists contended that mass digitization is necessary as it allows the public to be effective in the Information Age.

Panelists Eric Harberson of the University of Colorado Music Library and Janice Pilch, Copyright and Licensing Librarian for Rutgers University's Libraries, spoke of the need to reform section 108 to better assist librarians in preserving and granting access to their vast collections. Authors Guild President Paul Aiken insisted a balance be struck, though, between access to material and incentive to create.

But Gloria Phares of Patterson Belknap Webb & Tyler LLP noted that the language of section 108 does not clearly permit mass digitization. Phares opined that mass digitization appears to conflict with the very essence of copyright law and if it is allowed, it must be regulated.

Panel 4 - What Should be the Conditions on Libraries Digitizing, Maintaining and Making Available Copyrighted Works?

The final panel explored the conditions that should apply to libraries and archives when digitizing works. Professor Kenneth Crews, the Director of the Copyright Advisory Office at Columbia University, said the goal of reform is to create balanced copyright laws that are practical for law-abiding citizens.

Crews explained the challenges with both defined and open-ended exceptions, arguing that inflexible laws may become obsolete, static, and difficult to amend when change is necessary. Since fair use is used to fill the gaps between narrowly tailored exceptions, Crews also advocated that fair use be cultivated.

William Maher, University Archivist and Professor of Library Administration at the University of Illinois at Urbana-Champaign, highlighted the differences between archives and other educational institutions. Maher stressed that the copyright law exceptions inadequately address the interests of archivists.

Overall, the panel emphasized the difficulty in drafting exceptions sufficiently responsive to the various competing interests.

To view the entire symposium, please visit the redesigned Kernochan Center website, www.law.columbia.edu/kernochan.

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recent cases in which judges stated that instead of piecemeal decisions by the courts, Congress should provide legislative fixes to address copyright-related problems.

Pallante noted that the list of subject areas that must be addressed in the next Copyright Act is long. Issues such as digital first sale, orphan works, the revision or elimination of certain statutory licenses, mass digitization, and the federalized protection of pre-1972 sound recordings are top priorities in any redrafting attempt. She also alluded to a proposal which would revive formalities in the last years of copyright protection.

The Register noted that the revised Copyright Act should be flexible, forward-looking, and workable, granting meaningful control to copyright holders, yet simultaneously securing access to information.

She stressed the need to address the challenges of online streaming and the problems regarding the widespread infringement of sound recordings. She also emphasized that the next Act should be enforceable while providing remedies that are compatible with small and large infringement claims.

In closing, Pallante stressed that copyright revision will require Congress to do that which it has historically done – remain committed to improving copyright law, preserve policy

goals, maintain a balance between public and private interests, and embrace innovative technological advances. Copyright law is a complex area, she noted, and it is important that members of Congress working on any large revision of the Act be knowledgeable about the field and respectful of its history.



Maria Pallante, U.S. Register of Copyrights

SPRING IP SPEAKER SERIES EXPLORES COPYRIGHT AND ARTISTS' RIGHTS

Charles Sims of Proskauer, and Sherwin Siy, Vice President of Public Knowledge, began the Center's Spring IP Speaker Series on January 29. They discussed the recent Supreme Court case *Kirtsaeng v. Wiley* and the application of the first sale doctrine to copies made outside of the United States.



Jeffrey Cunard of Debevoise & Plimpton speaks on February 12 during the Spring IP Speaker Series

The series continued on February 12 with Jeffrey Cunard of Debevoise & Plimpton and Michael Elkin of Winston & Strawn. They explained the unique complications that digital media service providers present for copyright laws in their discussion, "On Demand: Copyright Issues Concerning New Technologies for Delivery of TV and Movies."

Graeme Austin, Chair in Private Law at Victoria University of Wellington and Professor of Law at Melbourne University Law School, spoke about "Copyright and Human Rights: Conflicts and Accommodations" on February 19. Austin provided a history of human rights and copyright law. According to Article 27 of the Universal Declaration of Human Rights (1948), "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." He said that the human rights perspective invites a more focused approach to copyright that should appeal to even the copyright critics unless they are in disagreement with the Universal Declaration of Human Rights.

On February 26, Robert Clarida '93 of Reitler, Kailas and Rosenblatt LLC and University of Geneva Professor Jacques de Werra LL.M. '01 asked "Do I Own It? (And Can I Sell it?)" as they spoke about the idea of the digital first sale doctrine. Clarida noted that Congress rejected the idea that digital first sale was permitted under section 109 of the Act, and the Copyright Office noted in a 2001 report that the first sale doctrine not

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be amended to include digital copies. DeWerra and Clarida also explained the differences between a license and a sale of copies of software and other digital works and provided a comparative look at EU and U.S. copyright law.

On Wednesday, February 27, the Center welcomed two prominent art lawyers to discuss what it means to represent visual artists. Nancy Wolff of Cowan DeBaets Abrahams & Sheppard and John Silberman, founder of John Silberman Associates, discussed their practices and the unique issues that their clients face. They also noted the diversity of practice areas that can lead to a career representing artists, and trends they see in the field.

Jerker Rydén, Senior Advisor, National Library of Sweden in Stockholm, spoke about European Copyright Law on Monday, March 11, in a talk co-sponsored with the Columbia University libraries.

On Tuesday, March 12, Yafit Lev-Aretz LL.M. '09, Kernochan Center IP Fellow and Marc Wendell, Product Manager, at ImageIRC, Getty Images, spoke about "Second Level Agreements and Frictionless Licensing: When User-Generated Content Meets Copyright Practice." Wendell discussed steps photographers are taking to keep copyright information attached to images and easily accessible to potential licensees.

The spring series wrapped up on April 16 with a talk on copyright and orphan works with Nancy Wolff and Melissa Levine of UM Copyright Office, University of Michigan Library. They discussed the recent litigation in the HathiTrust case and the advantages and concerns surrounding mass digitization of library collections.



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