

COLUMBIA UNIVERSITY SCHOOL OF LAW
KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS
435 WEST 116TH STREET, BOX A-17
NEW YORK, NEW YORK 10027

Nonprofit Org.
U.S. Postage
PAID
Columbia
University

Google Settlement Agreement Conference

(Continued from page 2)

which viewed the Settlement through the lens of the public interest. Alex Macgillivray, then Associate General Counsel at Google, and Jeffrey Cunard of Debevoise & Plimpton, who represented the publishers in the Settlement negotiations, discussed the benefits of the project. Mr. Macgillivray observed that the audience members and students at elite schools certainly had access to vast amounts of the world’s knowledge, but that the remaining 99% of the United States did not. He pointed out that the Settlement would vastly increase the availability of out-of-print books to users throughout the country, and would make library collections available to the visually impaired. Cunard said that the Book Search project was consistent with the core principles of copyright, would increase digital literacy, and introduced new revenue models that benefited creators and users alike.

On the other hand, Professor James Grimmelman of New York Law School raised his concerns about the power that the Settlement agreement would give Google over orphan works and, more broadly, over the nation’s culture. Carol Mandel, Dean of Libraries at N.Y.U., said she believed that as more and more libraries digitize their own collections, Google’s repository will become less relevant.

Recent Developments

Developments since our March conference indicate that the Settlement agreement will be significantly revised. Many individuals and organizations filed briefs with the court expressing

concerns about the Settlement. And despite her assertion at the Columbia conference that she was not opposed “in principle,” Marybeth Peters testified before the House Judiciary Committee that the Copyright Office had grave concerns about the agreement. A week later, the Justice Department filed a brief in District Court saying that while the project was commendable, the Settlement agreement needed to be revised. The Authors Guild requested an adjournment of the fairness hearing previously scheduled for October 7 so that the parties could negotiate modifications to the Settlement agreement. In light of the circumstances, District Court Judge Denny Chin has postponed the hearing. All eyes will be on the parties as they make their next move.



The Hon. Marybeth Peters, Register for the U.S. Copyright Office

© 2009 Lynn Kolibaba



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

COLUMBIA UNIVERSITY SCHOOL OF LAW

FALL 2009



Lital Helman, Kernochan Center Fellow

Center Welcomes Second Academic Fellow

Lital Helman, an Israeli lawyer and Fulbright scholar, was selected as the Kernochan Center’s second Intellectual Property Fellow. She began her residence at Columbia last month. While at CLS, Lital will prepare for an academic career in intellectual property law.

Lital completed her law degree at the Hebrew University in Jerusalem in 2005 and then worked in private practice at a firm there specializing in commercial and intellectual property law. She was selected as a Fulbright scholar in 2007 and received her LL.M. at the University of Pennsylvania Law School in 2008. She was pursuing her S.J.D. at Penn when she was selected as a Kernochan Center Fellow. While at Columbia, she will continue researching her S.J.D. topic of secondary liability for copyright infringement in the digital era.

Lital was attracted to the Kernochan Fellowship because of its focus on copyright issues and international issues, its programs and initiatives, and the reputation of its faculty. She hopes her time here will hone her research and writing skills while exposing her to a wide range of ideas and issues.

When she is not preparing for a career in the classroom, Lital likes to play the mandolin and guitar and to travel. She has traveled extensively in China and Vietnam and most recently went to Kitzbühl, Austria. Lital and her husband live on the Upper West Side of Manhattan.

Spring Conference Examines Google Settlement Agreement

By Tim Cohan '11

The agreement that would allow Google, Inc. to go forward with its plan to digitize the contents of some of the nation’s largest libraries was the subject of a day-long symposium sponsored by the Kernochan Center on March 13, 2009.

June Besek, Executive Director of the Kernochan Center, opened the conference with an overview of the litigation and Settlement Agreement. She explained that the settlement class consists of all persons with a copyright interest under U.S. law in a book made available to the public and registered with the U.S. Copyright Office by January 5, 2009. If it is a book of foreign origin, it need not have been registered. Under the Settlement, Google would be permitted to digitize books and include them in its database, and to allow various types of access to the contents of out-of-print books (preview uses, or full-text access though institutional subscriptions or individual purchases). Permissible uses for in-print books are much narrower. In either case, rightsholders may

alter the scope of the “default” uses or opt out of the agreement entirely.

Revenues from advertising, individual sales and institutional licenses would be split 37-63 between Google and the rightsholders. Google would make a substantial payment to compensate rights-holders whose works were scanned, and to subsidize the creation of a nonprofit entity, the Books Rights Registry. The Registry, co-managed by authors and publishers, would be responsible for receiving revenues from Google and dividing them among authors and publishers; locating absent rightsholders; and assisting in the resolution of disputes among rightsholders. She noted that rightsholders who chose to opt out of the Settlement Agreement had to do so by May 5, 2009. (That date was subsequently extended to September 4.)

Skepticism from the Copyright Office

U.S. Register of Copyrights Marybeth Peters gave the keynote address, calling the Google Settlement a “great achieve-

ment.” The balance of her comments, however, largely reflected concern about the potential impact of the Settlement on U.S. copyright law: Is this class-action Settlement effectively a form of legislation? Will the Settlement adversely affect stalled “orphan works” legislation? Will it sidestep the legislative investigation that generally precedes revisions of U.S. copyright law? Ms. Peters expressed concern over the agreement’s “forward-looking aspect that didn’t benefit from public input,” a harbinger of her September 10 testimony before the House Judiciary Committee.

A Google Monopoly?

Professor Randal C. Picker of the University of Chicago discussed antitrust concerns raised by the Settlement. Picker stressed that while Google may in fact be a monopoly, a monopoly is not necessarily illegal or even undesirable. The task from an antitrust perspective, he suggested,

(Continued on page 2)

Graduating Students Awarded Annual Prizes

By Tim Cohan '11

Each year Columbia Law School, in conjunction with the Kernochan Center, offers two prizes: the Andrew D. Fried Memorial Prize for the best student essay published that year in the COLUMBIA JOURNAL OF LAW AND THE ARTS, and the Carroll G. Harper Prize, awarded in recognition of the highest standards of achievement in intellectual property studies and writing.

Lauren Howard's article, "An Uningenious Paradox," 32 COLUM. J.L. & ARTS 101 (2009), investigates the assumptions underlying fashion's "Piracy Paradox" (the idea of high creative output with relatively low IP protection), and how these assumptions affect a legal approach to fashion design piracy. Lauren was also Editor-in-Chief of the JOURNAL this past year, and in that capacity helped host the Kernochan Center's Symposium on Secondary Liability in January, 2009. A committed "New York-phile," Lauren is currently working in the litigation department of Davis Polk & Wardwell LLP.

Alex Middleton '09 and Luis Villa '09 received the Carroll G. Harper Prize this year. Alex came to law school after stints in college radio and the software industry, expanding on his early interest in IP by making the most of the wide range of course offerings, extracurricular activities, externships, and

Google Settlement Agreement Conference

(Continued from page 1)

would be to sort out the natural monopoly components of the agreement – elements best left to Google from the consumer’s perspective – from elements of the digital library that can “sustain competition.” In his view, aspects of the Settlement that raised red antitrust flags included the pricing scheme, through which Google and the Book Rights Registry determine the “optimal” prices for books, and the “most favored nations” clause, which restricts the Registry for ten years from licensing Google competitors on more favorable terms than those applicable to Google.

Panel 1: The Future of Books

Most of the members of the first panel agreed that it is a mistake to assume that digital books have arisen as a threat and in opposition to traditional print books. Allan Adler of the American Association of Publishers said it was unclear how the Settlement would affect publishers in the long-term. Niko Pfund of Oxford University Press suggested that the smaller publishers, those with little or no existing digital infrastructure, would benefit the most, with decreasing benefits for larger houses that already had a digital arm were already marketing works in digital form.. And the panelists agreed that a wake-up call was necessary; as Richard Sarnoff of Bertelsmann, Inc. noted, “industries ignore the future at their peril.”

Panel 2: Authors and Incentives

Professor Jane Ginsburg led the day's second panel, which focused on authors and incentives. Specifically, questions to the panelists aimed to clarify which parties were in-

intellectual property events at Columbia Law. He was a research assistant for Professor Tim Wu, worked with Volunteer Lawyers for the Arts, served as Vice President of EASLS and was an editor for the COLUMBIA JOURNAL OF LAW AND THE ARTS. Alex is heading to the Chicago office of Jones Day this fall, with plans to join the firm's IP group.

The other Harper Prize recipient, Luis Villa, is highly accomplished in intellectual property issues arising from new technologies. After launching and negotiating the sale of an open-source software startup, Luis spent a year at Harvard Law School's Berkman Center for Internet & Society in a role he describes as "Senior Geek in Residence." Here at Columbia, he remained on the cutting edge of legal issues in Internet-driven IP creation, with relevant courses and activities, a proactive role as Editor-in-Chief of the COLUMBIA SCIENCE AND TECHNOLOGY LAW REVIEW, and as a member of the Society for Law, Science and Technology. Luis will work in the General Counsel's office at Mozilla, the makers of the Firefox browser.

Congratulations to all the prize recipients. We wish them the best as they begin their careers in law.

cluded in the Settlement, and how money would flow under the tentative model. Author Eugene Linden focused on the precarious position of today's writers, noting that they are "ripe for exploitation" and voicing fears that Google and the post-settlement players will continue to have the power to "roll over writers." Tracey Armstrong of the Copyright Clearance Center observed that the administrative challenges to the Book Rights Registry would be enormous and suggested that these challenges had not been taken fully into consideration. "Cutting checks is the least of the problem," she said. The system would have to catalogue multiple rightsholders for individual works, license works within works, and track ongoing transfers of ownership. Finally, Victor Perlman of the American Society of Media Photographers expressed concern about the exclusion of most illustrations from the Settlement.

Panel 3: The Public Interest

Mary Rasenberger of Skadden, Arps, Slate, Meagher & Flom LLP was the moderator for the final panel of the day,
(Continued on page 4)

PUBLISHED BY
KERNOCHAN CENTER FOR LAW,
MEDIA AND THE ARTS
COLUMBIA LAW SCHOOL
435 WEST 116TH STREET, BOX A-17
NEW YORK, NEW YORK 10027
PHONE: (212) 854-7424
FAX: (212) 854-9111

Kernochan Center Updates . . .

Professor **Jane Ginsburg**, the Center's Director, spent much of the summer in Europe. In early June she lectured at the Copenhagen Business School and Lund University in Sweden on a variety of current copyright topics including the Google Books Settlement. Later that month she and Executive Director, **June Besek**, spoke at the annual ALAI Congress (held in London this year). Profes-

Professor Ginsburg spoke on "The U.S. Experience with Copyright Formalities: A Love/Hate Relationship" while Besek spoke on "The Development of Digital Libraries in the United States." July saw Professor Ginsburg in Spain where she gave a talk on current copyright and trademark issues at the Barcelona College of Lawyers (the local Bar Association) and on social networking at the Universitat Oberta de Catalunya. Professor Ginsburg taught Legal Methods to the first-year class at CLS in August and left in early October for a three-week term at the University of Auckland as a Legal Research Foundation Visiting Scholar.

In August, **June Besek** spoke at a copyright seminar in Bogota, Colombia,

that was cosponsored by the World Intellectual Property Organization and the Colombian Copyright Office. Her talk addressed access to illustrated works through digital libraries and electronic book databases. The three-day seminar, entitled "Illustration – A Way to Imagine a Literary Work," was held in conjunction with Bogota's International Book Fair.

The Center's Assistant Director, **Pippa Loengard**, was named to the Executive Committee of the New York State Bar Association's Entertainment and Sports Law Section in June, co-chairing the section's pro bono efforts. In September, she organized a clinic at Actor's Equity for low-income members of that group and is planning a similar event at the Dramatists Guild this winter. Ms. Loengard also received her LL.M. in Taxation from N.Y.U. School of Law this summer.

In June, Center Fellow **Eva Subotnik** moderated a panel discussion entitled "Artists' Rights in the YouTube Era" for the Columbia Law School reunion weekend. In addition, she attended the IP

Scholars Conference at Cardozo Law School, and the inaugural conference of the International Society for the History and Theory of IP at Bocconi University in Milan, Italy.

The Center welcomed its first International IP Visiting Scholar in September. **Dr. Goce Naumovski**, a member of the Faculty of Law at Justinianus Primus in Skopje, Macedonia, spent a month in residence focusing on analyzing intellectual property law and entertainment law curricula at U.S. law schools, including methods of teaching and practical training. His research also reviewed the curricula of several European universities' courses to analyze the similarities and differences with those of U.S. universities.

Dr. Naumovski's goal is to compare the experiences of U.S. law school students in the field of intellectual property law to those studying at The Centre for Intellectual Property Education of the Justinianus Primus Faculty of Law and at the other universities in Macedonia and the region.

Alumni Offer Varied Paths to IP Careers

On September 23, the Kernochan Center welcomed back three alumni working in intellectual property for non-profit or governmental organizations. In a time when firm jobs are scarce and students are looking to different avenues where they can begin their career, the Center provided a look into some less-traditional career options. While all our panelists began their careers at large firms, one tried a variety of practices before finding a good fit outside of private practice, while another worked at a firm for just over a year.

Sandra Baron '74, the Executive Director of the Media Law Resource Center, spoke of her desire to meld an interest in journalism with a career in law. She began her career working with Floyd Abrams at Cahill Gordon & Reindel LLP. Mr. Abrams helped her get her first in-house job, and she stressed the importance of staying in close touch with those you meet or work with along your

journey.

The Hon. Lorelei Ritchie '96 serves as a federal trademark judge on the U.S. Trademark Trial and Appeal Board. In addition to her work on the bench, she is a Visiting Professor of Law at UCLA Law School where she teaches Intellectual Property Licensing. Judge Ritchie worked at three firms for two years each before realizing that she wanted a career in academia and the public sector. She reminded students that the government is a stable employer in tough economic times and can often provide high-level work to young attorneys.

Matt Zimmerman '00, is a Senior Staff Attorney at the Electronic Frontier Foundation focusing on free speech and privacy law. While Matt worked for Morrison & Foerster LLP after graduation, he noted that he did not initially get the job through Columbia's Early Interview Period and had to pursue the position. He was at the firm for only a year

after which he received a fellowship to a nonprofit which he parlayed into his current career, proving again that there are many paths to success in a difficult field. It was refreshing for the students to hear that even if traditional paths close, there are many options still available to them.

