

KERNOCHAN CENTER

FOR LAW, MEDIA AND THE ARTS

Spring 2016

BESTSELLING AUTHOR BRAD MELTZER '96 DELIVERS MANGES LECTURE

On March 24, bestselling author Brad Meltzer '96 returned to Columbia to deliver the 29th Horace S. Manges Lecture, "Copy Write: The Author Survival Guide."

A writer of legal thrillers, mysteries, and children's books – and the host of a TV series – Meltzer discussed the Law School's influence on his writing career, especially the insights and encouragement his professors gave him. "Everything I needed in my career," he said, "I learned in my first year of school [here]: Contracts, torts, civil procedure, property, constitutional law, criminal law, research and writing."

Meltzer came to Columbia having spent a year in Boston where he wrote a draft of a novel. He immediately sought out Professor Jane Ginsburg for help in publishing the book. She sent him to distinguished alumnus and agent Morton Janklow, who gave him a list of potential agents to contact. While that novel was never published, Meltzer conceived the idea for what would become his first published novel in his first-year torts class and completed it as an independent study.



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Brad Meltzer '96 delivers the 29th Annual Manges Lecture, "Copy Write: The Author Survival Guide"

Meltzer spoke of many instances where human intervention affected the course of enforcing the law. That, too,

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KERNOCHAN SPRING SPEAKER SERIES BRINGS IP LEADERS TO CAMPUS

Once again, the Kernochan Center spring IP Speaker Series brought cutting edge speakers to campus and exposed students to the latest debates in copyright.



Rina Pantalony, Columbia University Copyright Advisory Office

The first panel of spring 2016 featured the Director of the Columbia University Copyright Advisory Office, Rina Pantalony, and Bruce Rich, partner at Weil, Gotshal and Manges LLP, who

spoke on fair use in academic settings. The speakers asserted that weighing the fair use factors in an academic context is often more challenging than in other contexts.

Taking the conversation back 20 years to the "copy center" jurisprudence of the 1990s, Rich said that those cases had not served as precedent for digitized course materials, but should have. Copyright, he argued, should be media-neutral; if it was not fair use for brick-and-mortar copy shops to make photocopied coursepacks without licensing the individual excerpts, then the same was true when professors posted digitized excerpts online for student access. Rich, who was lead counsel for the plaintiffs in the 11th Circuit case *Cambridge University Press v. Georgia State University*, said the court did not seem interested in the publishers' (or authors') lost licensing revenue, but seemingly more concerned with the potential cost to GSU students.



*Bruce Rich,
Weil, Gotshal and Manges LLP*

Pantalony also criticized the decision, albeit on different grounds. Her concerns centered on the confusion the Court of Appeals' decision created for universities. "We didn't see this as a coursepack in an electronic format, but as a reserve item in a digital format," she said. While the court said this was not a fair analogy, it

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did not illuminate the issue further.

In addition, Pantalone understood the court's decision to have the district court review each work at issue again in light of the appellate court's rulings on evaluating the amount and substantiality of the use and the manner in which to weigh the fair use factors. She also acknowledged that fair use is best served after a case-by-case analysis, but she expressed concern about how this could be implemented by large universities. "How far in advance will faculty have to provide lists of readings?" she asked. "How do we provide education to library staff to make these determinations?"



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Jacqueline Charlesworth of the U.S. Copyright Office and
Raza Panjwani of Public Knowledge

The next week, Professor Edward Lee from Chicago-Kent College of Law and founder of The Free Internet Project, and Mark Rothenberg of the Electronic Privacy Information Center, debated whether or not Americans should have a "right to be forgotten." The issue of personal information stored on the internet for all-time has been raised around the world in recent years. The EU's 2012 General Data Protection Directive mandates strict protections of personal data and the right for individuals to have redress should the data be misused. A recent European Court of Justice decision suggested that public figures have a weaker "right to be forgotten" than private actors.

Lee suggested that the best solution here in the U.S. is private monitoring and encouraging Google to adopt a policy on "right to be forgotten" as part of its "best practices." Rothenberg, however, feared that search engines have little incentive to assist those wishing to remove data from their online footprint. Rebutting views that making some online data unavailable was censorship, Rothenberg noted various instances in which such access has always been limited, such as juvenile arrest records or lists of people who have borrowed books from the public library.

February 23 brought attorney Jonathan Band and Christian Troncoso, Policy Director of BSA | The Software Alliance, to campus to debate the scope of copyright protection in computer programs. The issue had come to the forefront in *Oracle v. Google*, a Federal Circuit case concerning the cop-

yrightability of the application program interfaces (APIs) of Oracle's popular Java program. The district court ruled that the interfaces, which allow programs to speak to one another, could not be copyrighted. The Court of Appeals, however, held that they were copyrightable, although Google might have a fair use defense to its use of the APIs. Troncoso claimed the Federal Circuit's decision was correct, arguing that Google wanted to use the program merely because it was easier and quicker than developing the software on its own. Band disagreed, saying that Google had not taken a majority of, let alone the entire, program and that the material taken was a method to achieve a purpose, not an instance of copyrightable expression.

On March 1, Jacqueline Charlesworth, General Counsel of the U.S. Copyright Office, and Public Knowledge's Raza Panjwani presented an overview of issues regarding exemptions to section 1201's anti-circumvention measures. Section 1201 was enacted in 1998 to, among other things, prohibit circumvention of technological protection for copyrighted works. It contains a number of exemptions, as well as a triennial rulemaking process to provide a means for users who claim that the prohibition prevents them from making non-infringing uses to achieve additional exemptions that will last for three years. The last such review was completed in the fall of 2015. The Copyright Office received 28 proposals for such exemptions, granting 22 of them. Some of the approved proposals included the "jailbreaking" of tablets and cell phones as well as the ability to bypass protection on some automobile software. However, the Office denied the request of users wishing to format-shift items such as e-books.

The Copyright Office has now undertaken a study to assess the rulemaking procedures as a whole, asking for comments on subjects such as whether the exemptions should renew automatically if there is no significant opposition, rather than requiring a *de novo* determination every three years. Panjwani argued that applying for exemptions is an onerous process that should not have to be repeated every three years. Furthermore, he urged that section 1201 contravenes the purpose of copyright law, which he contends is to further creative thought, not to interfere with mechanics' abilities to disable or remove technological protection on software in order to repair cars.

Panjwani argued that the rulemakings have exceeded the abilities of the Copyright Office to manage the process, both in terms of the volume of comments received and the Office's particular areas of expertise. Charlesworth acknowledged that when the section was drafted no one contemplated the monumental increase in technologies using encrypted software, and conceded that the Office does find the number of applications at times overwhelming. But, she noted, it is up to users to participate in the Office's policy studies and discuss the problems they encounter in the procedures – and ultimately up to Congress to enact reform.

We will have a summary of the second half of the Speaker Series in our next newsletter.

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was a lesson he learned at Columbia Law School.

"Yes, the intellectual information in classes is vital. But its application, its nuances, its understanding, it always comes through the human filter, and it always will," Meltzer affirmed. "At the start of this lecture, I told you that I wanted to answer one question: How? How do you build a career in this world of art and the law, in this world of copyright and intellectual property? As an answer I mentioned to you that everything I needed in my career as a lawyer I learned in this school." Meltzer concluded by saying "I still believe that, but as I was putting this talk together, as I went back over each story I told you, I realized that I left out the greatest thing that this school gave me—its people. Every problem I had, nearly every question I faced, I found the answer from someone at Columbia."



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Professor Jane Ginsburg welcomes Brad Meltzer

JANE GINSBURG'S SABBATICAL TRAVELS



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Kernochan Center Faculty Director Jane Ginsburg was on sabbatical during the spring 2016 semester. She spent part of the spring lecturing in South Africa. On February 24, she spoke (L) on "The Role of Copyright Exceptions in Promoting Creativity" at the University of Cape Town. She spoke on copyright protection for applied art at the University of Johannesburg and on the reciprocal relationship of copyright and trademarks at the University of South Africa (Unisa) in Pretoria (R), where she received a tee shirt which was the subject of a famous South African trademark parody case.

RECENT ALUMNI RETURN TO GIVE ADVICE TO CURRENT STUDENTS



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On September 21, we once again welcomed back alumni practicing in the fields of arts and entertainment. Luis Villa '04, Celia Muller '11, Zachary Werner '13, and Julia Fisherman '05, discussed their careers and gave advice to students on everything from which law school classes have been useful in their practice to ways to transition from firm life to an in-house position.

(Left to Right) Luis Villa '04, Celia Muller '11, Zachary Werner '13, and Julia Fisherman '05, with Kernochan Center Deputy Director Pippa Loengard '03

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KERNOCHAN CENTER SYMPOSIUM: COPYRIGHT OUTSIDE THE BOX

The Kernochan Center's Annual Symposium took place on Friday, October 2, 2015. Its focus was on copyright in areas often omitted from the traditional discussion such as tattoos, gardens, computer-generated works and conceptual art, as well as what authorship means in the 21st century.

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Photos (left to right): (1) Keynote speaker Joseph Liu '94, Boston College Law School (2) Jennifer Rothman, Loyola Law School; Eva Subotnik '03 (Kernochan Center IP Fellow, 2009-2011), St. John's University Law School and Jay Dougherty '81, Loyola Law School (3) Bruce Boyden, Marquette Law School; James Grimmelmann, University of Maryland Francis King Carey School of Law and Annemarie Bridy, University of Idaho College of Law (4) Keynote Speaker Robert Kasunic, United States Copyright Office

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