

KERNOCHAN CENTER

FOR LAW, MEDIA AND THE ARTS

Summer 2015

POPULAR KERNOCHAN CENTER SPRING IP SPEAKER SERIES CONTINUED

In the last issue of the Newsletter, we recapped the first lectures in the Kernochan Center Spring IP Series. The series continued on March 3 and we now present a summary of the rest of the programs.

The Kernochan Center's Spring IP speaker series continued on March 3 with Debevoise & Plimpton LLP partner Jeffrey Cunard and Nancy Wolff of Cowan DeBaets Abrahams & Shepherd LLP.

Cunard serves as General Counsel of the College Art Association (CAA), an organization made up of professionals from institutions embedded in larger organizations nationwide. He and Wolff discussed the CAA's recently published Guidelines for Fair Use in the Visual Arts, written to provide guidance to those wishing to exploit artistic works. Cunard described the process the CAA used, comparing it to the development of existing guidelines such as those for documentary filmmakers.

He said the motivation for the CAA was a worry that too many works of visual art were not being used for fear of infringing



Jacqueline Charlesworth



Nancy Wolff

the copyright of the creator or transferee. Wolff agreed that so-called "Orphan Works" posed a problem, but was concerned that these guidelines would be used in other cases as well.

She also thought that the Guidelines broadly defined transformative use, and she and Cunard discussed the concern that an over-broad definition of transformation posed a threat to the derivative work right enjoyed under Section 106

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SPOTLIGHT ON DAVID LEICHTMAN '96: A LONG HISTORY WITH VLA

By David Wang '17

For David Leichtman '96, a partner at Robins Kaplan LLP, ties that he established with Volunteer Lawyers for the Arts (VLA) during his time at Columbia Law School continue to play a significant role in his practice and *pro bono* commitment.

When applying to law school, Leichtman knew he was interested in the arts; he already held a Bachelor's Degree in Theater and a Master's Degree in Theater History.

He was drawn to Columbia because of its intellectual property program's focus on copyright law, the presence of the Kernochan Center and the relationship the school had with VLA through what was then THE COLUMBIA-VLA JOURNAL OF LAW & THE ARTS.

Leichtman took a wide variety of classes at Columbia, from courses in patents, trademarks and copyrights to advanced federal courts and advanced arbitration, and reveals that the ones that had

the biggest impact on him were the first year classes in legal methods, contracts and civil procedure, as they provided the foundation for his career.

In addition to studying in the classroom, Leichtman honed his skills while spending late nights working on THE COLUMBIA-VLA JOURNAL OF LAW & THE ARTS as Editor-in-Chief, interning with a federal magistrate and at VLA, and trying over 20 cases in the Department of Labor as the Chairman of the Unemployment Action Center student advocacy organization.

After graduation, Leichtman continued his involvement with VLA as a volunteer while working at Morgan Lewis & Bockius LLP, where he became a partner



David Leichtman '96

in 2003. Concurrently, the energy and passion he showed as a volunteer earned him a position on the Board of Directors of VLA.

In 2007, he was recruited by Lovells to start their U.S. intellectual property litigation practice. Unfortunately, due to client conflicts that arose when Lovells merged with another firm in 2010, Leichtman was unable to join the merged firm, Hogan Lovells.

However, this presented him the opportunity to be a founding member of the New York office of Robins Kaplan and oversee its growth from a three-person office five years ago to ten times that size today.

While his current practice involves high profile work in cases in the entertainment and media, financial services, and life sciences industries, he is also currently serving as the Chairman of the Board of Directors of VLA, where he not only helps run the organization, but also main-

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POPULAR KERNOCHAN CENTER SPRING IP SPEAKER SERIES CONTINUED

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of the Copyright Act.

The next discussion brought Tucker McCrady '01 back to campus. He and Jacqueline Charlesworth, General Counsel of the U.S. Copyright Office, gave an overview of the complicated area of music licensing and expounded on the need for reform as reflected in the Copyright Office's recent report: *Copyright and the Music Marketplace* (February 2015).

McCrady, a partner at Greenberg Traurig LLP, said, "The need for reform could not be more acute...Rights are so fractured that it takes a huge amount of time and money to secure all the rights needed to license a song. How do you run a new business on this type of model?" He added that he thought the future of the music industry lies in streaming and if it is to succeed in this area, music licensing must be simplified.

On April 7, speakers Robert Clarida '93, a partner at Reitler, Kailas & Rosenblatt LLC, and Judith Finell, a musicologist, discussed the issues that arose in the infringement trial of Robin Thicke and Pharrell Williams and the song "Blurred Lines." Clarida, an attorney with a Ph.D. in music, and Finell, a frequent expert witness in music litigation, analyzed the case from a musicologist's point of view. Clarida noted that he thought he might not have found infringement, had he been on the jury, but that the instructions from the bench were not materially different than pattern jury instructions used in many copyright cases.

Finell disagreed (she had testified at trial on behalf of the Gaye family). She believed that the pitch, phrasing, structure and harmonies of Thicke's song were so similar to Marvin Gaye's "Get it On" that a finding of infringement was inevitable.

The next week Clarida made another appearance, with Kirkland & Ellis' Dale Cendali, to discuss the recent mass digitization cases including the recent decisions in *Google v. HathiTrust* and *Cambridge University Press v. Patton*. Both experts agreed that it is inappropriate to draw a bright line when it comes to fair use as the District Court in the *Cambridge University Press* decision had. The discussion focused on transformative use and the derivative work right and the increasing importance of the former in recent fair use jurisprudence. Both speakers expressed concern that courts are expanding the boundaries of transformative use, especially when the term does not appear in the Copyright Act's discussion of fair use.

The final panel in the series occurred on April 21 when Mary Rasenberger, Executive Director of The Authors Guild, and Bruce Boyden of Marquette Law School, tackled the topic of the requirements of authorship under the Copyright Act. Rasenberger noted that there is a built-in tension between incentivizing creation and creating a robust public domain. The realm of protected works of authorship would expand too far were it to cover works not authored by humans. Rasenberger and Boyden agreed that it is harder to determine who is an author of computer-generated works because increasingly works can be created with only ancillary human input. Furthermore, some digital works require as much input from the user as the developer, complicating an already complex area of copyright.

We look forward to another excellent series in the coming academic year.

MEET THE 2015 MICHAEL D. REMER MEMORIAL AWARD RECIPIENTS



Ryan Oringer '15

Each year the Kernochan Center awards the Michael D. Remer Memorial Award, given annually "to a graduating student whose activities and academic achievements demonstrate an interest in and aptitude for the fields of arts and copyright law."

The award this year was split between two members of the Class of 2015: Jenna Skoller and Ryan Oringer. During their tenure at the Law School, both

took a variety of intellectual property courses while also active on the COLUMBIA JOURNAL OF LAW & THE ARTS.

In addition to being Editor-in-Chief of the JOURNAL, Jenna was a student in, and subsequently a Teaching Assistant for, the VLA externship.

She was also a member of the inaugural Copyright Dispute Resolution externship. She took nine courses in IP including the core courses of patents, trademarks and copyright. She wrote her major and minor writing credits under the supervi-

sion of adjunct intellectual property professor Mavis Fowler-Williams '87.

Jenna also externed at Macmillan Publishing and hopes eventually to work for a digital media company. She will join the IP and Technology Group at Skadden this fall.

Ryan came to Columbia specifically because of the school's strong externship program and the Center's offerings in law and the arts.

He, too, participated in the VLA externship program and was a Teaching Assistant for the course. In addition, he took at least two IP courses each semester in his second and third years (and even one in his first!).

Ryan was a Digital Editor of the COLUMBIA JOURNAL OF LAW & THE ARTS and completed almost double the hours of pro bono work required for graduation. He will begin working in Gibson Dunn's Corporate Department in the fall.



Jenna Skoller '15

Catching Up with....Former Kernochan Center Visiting Scholars..... **Rebecca Giblin** (Spring 2011) remains a Professor at Monash University where she has been leading an international collaboration asking what copyright might look like today if designed from scratch. The resulting book will be published in 2016. In the Spring of 2015 she was a Visiting Scholar in France and has given lectures all over the world. She has also published several articles with Jane Ginsburg, in the *COLUMBIA JOURNAL OF LAW & THE ARTS* and elsewhere, on the *Aereo* cases..... **Plamena Popova** (Fall 2010) is a legal advisor to Wikipedia in her native Bulgaria and is also writing an article on panorama rights, the right to use pictures of public buildings and sculptures without permission. These rights were recently the subject of a vote in the EU Parliament where the Parliament vetoed proposed restrictions on the rights..... **Johan Axhamn** (Fall 2010) has served as representative and chief negotiator for Sweden during negotiations in the EU Council working group on collective rights management. The group's work culminated in the 2014 collective management Directive. After the Directive passed, he worked with the Swedish government on implementing the law in his home country. He also continues to teach IP and conduct research at Stockholm University's law school..... **Aleksei Kelli** (Spring 2010), continues to work on copyright reform in Estonia. He is an Associate Professor of Law at the University of Tartu and was until recently head of an Expert Group on the Codification of the Intellectual Property Law for the Ministry of Justice of Estonia.... Jane Ginsburg, June Besek and Pippa Loengard ran into **Burak Ozgen** (Spring 2010) and **Geidy Lung** (Fall 2012) at the ALAI conference in Bonn, Germany this summer. Burak is a Senior Legal Advisor with the European Grouping of Societies of Authors and Composers where he deals with copyright laws in the EU. He is also Legal Advisor of the International Music Council which represents grassroots musicians. Geidy Lung is Senior Counsellor of the Copyright Law Division of the Culture and Creative Industries Sector at the World Intellectual Property Organization (WIPO) in Geneva.

SPOTLIGHT ON DAVID LEICHTMAN '96

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tains several active *pro bono* cases for artists.

While some attorneys who have reached the level of success that Leichtman has experienced leave law firms to practice elsewhere, the challenge of hard cases, the variety of matters and businesses encountered, and the opportunity to go to court has kept him enjoying firm life.

For aspiring lawyers, Leichtman offers this advice: "Work hard and out-prepare your adversary. Preparation really is the key to success."

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