

KERNOCHAN CENTER

FOR LAW, MEDIA AND THE ARTS

Summer 2018

R. BRUCE RICH DELIVERS 31ST ANNUAL MANGES LECTURE



Photo Credit: Sam Hollenshead

R. Bruce Rich delivers the 2018 Manges Lecture

On March 26, R. Bruce Rich, co-chair of Weil Gotshal & Manges' Intellectual Property and Media practice, delivered the 31st annual Manges Lecture. His talk focused on

the role of the private practitioner in the evolution of copyright law and the interesting challenges posed by new media.

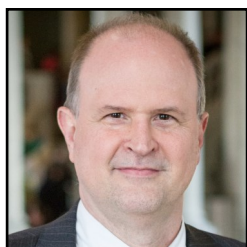
Calling his practice "rich and rewarding," Rich commented that it is not enough for a copyright lawyer to know the black letter copyright law; one also has to know ancillary areas of law, such as antitrust. "Copyright law," he said, "is rich in its constitutional and legislative heritage, in its doctrinal underpinnings and in its interplay with other important legal and social regimes and norms." An important dimension of this copyright matrix, he noted, is the central role practicing attorneys have played in the continuing evolution of copyright law. "Whereas the pace of legislative change in copyright law is glacial," he noted, "its evolution by court decision and evolving commercial practice is continual."

Rich highlighted some of the important issues facing the copyright community today. While a theoretical debate over the norms of copyright law is interesting, Rich said it did not prove useful in day-to-day

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SPRING IP SPEAKER SERIES CONCLUDES WITH THREE LUNCH TALKS

The Kernochan Center IP Speaker Series (featured in the previous newsletter) continued through the spring term. On February 27, Associate Register of Copyrights and Director of Registration Policy and Practice, Rob Kasunic, and Faculty Director Jane Ginsburg discussed



Rob Kasunic

copyright in useful articles after *Star Athletica, L. L. C. v. Varsity Brands, Inc.* (580 U.S. ____ (2017)).

Kasunic presented a brief history of the registration of useful articles, separability and the idea/expression dichotomy. He noted that the standard before *Star Athletica* was whether the artistic features of a useful article could be imagined separately and distinctly from the useful article without destroying its basic shape. Ginsburg reviewed the Supreme Court

decision and offered some visuals showing objects whose copyrightability could prove to be unclear under the new useful article test.

Just prior to the March Federal Circuit decision in *Oracle America, Inc. v. Google, Inc.* (750 F.3d 1381 (Fed. Cir. 2018)), then-Copyright Office General Counsel Sy Damle and Joe Gratz, a partner at Drurie Tangri LLP, discussed the copyright protection of software. The

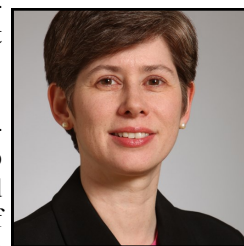


Sy Damle

speakers agreed that software code is protected under the Copyright Act, but debated the extent to which the non-literal elements of the software could be protected in light of 17 U.S.C. 102(b), which excludes processes from copyright protection. Gratz argued that if one takes the commands out of the written code,

there is nothing of value left in what remains and, thus, the code in question is a method of operation and not copyrightable.

Reitler, Kailis & Rosenblatt's Bob Clarida '93 and Claudia Ray of Kirkland & Ellis discussed current cases in



Claudia Ray

fair use on April 10. Much of the discussion focused on the increased judicial attention to whether a use is transformative and the broadening of the definition of that term. Reflecting on the recent Second Circuit decision in *Fox News Network, LLC v. TVEyes, Inc.* (883 F.3d 169 (2018)), the speakers questioned whether the technological changes TVEyes made to the news clips at issue were transformative at all. They also

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ALUMS IN THE MUSIC BUSINESS: PACESETTERS & DEALMAKERS

By Julia Ambros '20, Andrew Elliott '20 and Daniel Lee '20

Andrew Bart '78, graduated from Columbia with his sights on litigation. As his career grew, he found himself increasingly gravitating toward entertainment industry cases, and he now chairs Jenner & Block's Content, Media & Entertainment Practice.

Early in his career, Bart began to focus on music industry litigation. A role defending Led Zeppelin in an infringement lawsuit helped to spark his interest in making this field his career and set him on a path of playing key roles in industry-defining cases.

In 2002, Bart brought to conclusion a 15-year case between Phil Spector and the Ronettes, helping to establish the principle that "sync rights" are part of the umbrella of rights artists can sign over to their labels. In 2011, he led a suit against MP3Tunes – a decade-long battle



Andrew Bart

that helped solidify that content creators could still win big infringement cases in the era of "safe harbor" protections under the Digital Millennium Copyright Act.

The role of litigation, Bart says, has shifted as the business dynamics in the industry have evolved. While content creators initially perceived technology as a threat, they increasingly see technology companies as partners first, and adversaries second. Relatedly, as consumers increasingly want access to content, but care less about owning copies of works, creators' focus has shifted from blocking users from downloading infringing content to making the most of streaming partnerships.

Michael Kushner '81, is an Executive Vice President of Business & Legal Affairs at Atlantic Records and has been involved in hundreds of artist negotiations and signings throughout his 31 years in the industry. At Atlantic Records, Kushner has particularly enjoyed his involvement in bringing the Led Zeppelin catalogue into the digital era, as well as helping emerging artists and navigating the ever-changing technology that impacts the music industry.

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CENTER, LAW SCHOOL AWARD IP PRIZES AT 2018 GRADUATION

The Kernochan Center would like to congratulate the Class of 2018, and most notably those who won awards for their IP scholarship.

Jordyn Eisenpress and Luke Budiardjo are the recipients of the Carroll G. Harper prize for outstanding achievement in intellectual property studies.

Eisenpress was Executive Submissions Editor of the COLUMBIA JOURNAL OF LAW AND THE ARTS, President of EASLS, and took a variety of IP courses including the Copyright Dispute Resolution Externship. She interned at the National Advertising Division of the Better Business Bureau, and was the regional winner of the 2016 AIPLA Giles Rich Moot Court Competition.

Eisenpress will be joining Frankfurt Kurnit Klein & Selz as an associate in their advertising group. She majored in communications and advertising as an undergraduate, and became interested in the legal complexities involved; she chose Columbia Law School for its strength in the field of intellectual property. After taking the Bar Exam, she will explore the coast of Portugal, and she plans to return to Columbia as a guest judge for the AIPLA Moot Court.

Luke Budiardjo applied to Columbia because he wanted to study with its distinguished faculty, including the Kernochan Center's Professors Jane Ginsburg and Tim Wu. He found Professor Ginsburg's class on copyright law inspiring, and worked with her as a research assistant, a period of work he calls "one of the most intellectually challenging, enriching, and rewarding experiences of my life."

Budiardjo has a strong interest in technology and the law.

He will begin working as an associate with Kirkland & Ellis's Copyright, Trademark, Internet & Advertising group this fall, and will clerk for Judge Pierre Leval in the 2019-2020 term. He is also a jazz enthusiast who enjoyed performing with Columbia's Louis Armstrong Jazz Performance Program.

David Manella received the Andrew D. Fried Memorial Prize, awarded for the best student essay to be published this year in the COLUMBIA JOURNAL OF LAW AND THE ARTS on a subject in the field of intellectual property and related law, for his Note, "'Anything Goes': Regulating the Conduct of Money-Bundling Broadway Producers."

Manella graduated with a J.D. and a MFA in Theatre Management and Producing. He was Editor-in-Chief of the COLUMBIA JOURNAL OF LAW AND THE ARTS. Although he will be working as an associate at Irell and Manella in Los Angeles, he hopes to find his way back to Broadway someday as a producer or investor, or as a board member at a not-for-profit theatre company. His attendance at over 100 shows this year, including every show on Broadway, testifies to his enduring love of theatre.

Kevin Milewski is the winner of the Michael D. Remer Prize for the graduating student whose activities and academic achievements demonstrate an interest in and aptitude for the fields of arts and copyright law. He came to Columbia because of its strong academic program in these areas.

During his time in law school, Milewski interned at the Metropolitan Museum of Art and Marvel Entertainment. In addition, he was President of EASLS, participated in the Copyright Dispute Resolution externship and was a staff member of

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R. BRUCE RICH DELIVERS 31ST MANGES LECTURE

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practice. Instead, he spends his days focused on the application of the 1976 Act to emerging technologies. One example of this is attempting to figure out how new technological formats relate to exclusive rights under 106, while another is a review of whether pre-1972 sound recordings have a public performance right.

The final topic Rich covered was fair use. He argued that courts should not focus as much on transformative use but instead place greater emphasis on market harm. Rich concluded with some observations about a fair use case he has been litigating for eight years: *Cambridge University Press et. al. v. Becker et. al.* (No 1:08-cv-01425-ODE (N.D. Ga 2016)). He noted that at the outset, he thought the facts presented a clear case of copyright infringement, but courts in the 11th Circuit have disagreed. The District Court has, he said, made the market harm test an impossible challenge for publishers. Rich concluded by saying that this case sums up all that's interesting about copyright. It is exciting, dynamic, enervating and unpredictable.

SPRING IP SPEAKER SERIES CONCLUDES WITH THREE TALKS

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debated the tension between an author's derivative work right under 17 U.S.C. 106 and recent jurisprudence indicating that a change in media is enough to "transform" a work.

The final luncheon focused on 17 U.S.C. 512's notice and takedown provisions. The speakers reviewed recent developments and discussed whether the need for an internet service provider safe harbor had waned since the adoption of the DMCA. Michael Elkin of Winston & Strawn LLP argued that the system works well and content owners have been able to shut down sites trafficking in infringing works. While he said he was understanding of content owners' concerns over repeated infringing postings, Elkin argued that ISPs still need protection from the effects of copyright trolls who file frivolous lawsuits that cost a lot to defend. The MPAA's Jennifer Pariser countered that ISPs and online businesses no longer need the protections they were given under the DMCA. And, she added, the current focus on which party the court feels is at greater fault has shifted the law away from copyright's strict liability standard. Addressing the "whack-a-mole" problem of repeated posts infringing the same work, Pariser urged the adoption of a "take down, stay down" policy while Elkin argued that there is no mandate for this under §512(m) and it is too costly a regime to impose without a statutory mandate.

ALUMNI PROFILES

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Kushner has many fond memories of his time at Columbia, listing his Constitutional Law classes with both Ruth Bader Ginsburg and Telford Taylor as particularly rewarding experiences. His third year Music Business Contracts seminar with Kellis Parker also had a great impact on him. When asked what advice he would give to young professionals who want to pursue a career in entertainment law, he recommends taking advantage of internships, spending time at a law firm to develop research and writing skills, and demonstrating interest in a specific area of practice.

Kushner is optimistic that Congress will pass the Music Modernization Act, which promises to streamline and centralize the process of mechanical licensing for the benefit of digital services and music publishers. Kushner believes that the Act would be a positive step for dealing with the inefficiencies of individual licensing in the face of a changing business model.



Michael Kushner

Michael Simon '90 has employed his legal education and experience to make his mark on the music industry. Today, he is the President and CEO of The Harry Fox Agency and Rumblefish—together the nation's leading provider of mechanical rights management, licensing and royalty services for both music producers and distributors—as well as the founder of his own record label.

Having recognized his interest in pursuing a music business career while pulling double-duty as the drummer and de facto manager of his band, Simon chose Columbia because of its strong intellectual property program. During law school, he studied under John Kernochan and Kellis Parker, and served on the COLUMBIA-VLA JOURNAL OF LAW AND THE ARTS. However, what he recalls most vividly is "being rendered speechless" by Professor Jane Ginsburg in her Copyright class.



Michael Simon

At the helm of HFA and Rumblefish, he oversees billions of lines of data to identify digital reproductions of copyrighted compositions and ensure that recording artists are compensated. During his nearly two decades with the company, he has helped the music industry to clarify the rights implicated in new music sharing technologies and to create licensing infrastructure suited for the digital world.

A lifelong musician, Simon takes pride in knowing that his work fosters the creation of new music. At HFA and Rumblefish, he works to ensure fair compensation for rights holders, who, in turn, funnel a portion of their income back into the creative community. At Simon Recordings, he collaborates with bands he believes in to create records that will endure.

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IP PRIZES AT 2018 GRADUATION

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the COLUMBIA JOURNAL OF LAW AND THE ARTS. He noted that he found his time with Professor June Besek inspiring; she encouraged his hopes to build a career in the field of intellectual property. He added, “Her excitement for the stories and artwork underlying foundational copyright cases assured me that a career working with law and the arts would be fulfilling.”

Milewski will be joining Proskauer’s corporate group in New York, where he hopes to focus on technology, media and telecommunications transactions.

SAVE THE DATE

October 19, 2018
Annual Kernochan Center
Symposium
on
The Right of Publicity

PUBLISHED BY
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