



Center's Annual Symposium Examines Digital Issues in Archives



Jane Ginsburg and Peter Hirtle discuss the risks and rewards of digital archiving

On Friday, April 16th, the Kernochan Center, in conjunction with the Rockefeller Archive Center, held a symposium entitled “Digital Archives: Navigating the Legal Shoals.” June M. Besek, the Center’s Executive Director and principal organizer of the conference, welcomed the audience to a day that would address issues that had long been of interest to the Center. In his introductory remarks, Jack Meyers of the Rockefeller Archive Center expressed his enthusiasm for bringing together archivists and lawyers to address the complex issues presented by digitization.

William J. Maher, archivist at the University of Illinois at Urbana-Champaign, began the morning with an overview of the issues that librarians and archivists encounter today. Mary

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Robert Merges Delivers Manges Lecture on IP as Property

On Monday, April 5, Professor Robert P. Merges JSD ’88, the Wilson Sonsini Goodrich & Rosati Professor of Law and Technology at UC Berkeley Law School, delivered the 23rd annual Horace S. Manges Lecture.

In his talk, titled “The Future of Property: Individual Ownership and the Digital Age,” Merges raised the question whether intellectual property is property at all. In his eyes, the traditional view of property—as individual control over individual assets—still holds in the digital era. Under this framework, the state has a role in granting the property right and then steps back to allow a certain amount of private ordering. While he conceded that intellectual property governance is seen by some as regulatory in nature, he cautioned that this approach obscures the reality that intellectual property is property in the traditional sense.

Merges acknowledged that for a whole generation of intellectual property scholars, this view is highly controversial. He identified two assumptions that he sees as implicit in the critique mounted by scholars opposing the proprietarian character of intellectual property: first, that assets are fundamentally different in a digital world; and second, that individual control is outmoded in an interconnected world. He addressed these in turn.

With respect to the exceptionalist view of digital works, Professor Merges argued that while ease of copying and transmission of works is an undeniable trait of the digital world, this ease has papered over the enduring reality that the creation of original, high-quality works of authorship is often an exacting, resource-intensive endeavor. He expressed concern that society risks falling prey to what he termed “digital determinism,” in which IP policy is

inexorably dictated by the new digital paradigm.

Merges then asked what the animating purpose of protecting individual creators is. For him, intellectual property protection is grounded in autonomy and dignity considerations, under which individuals should have rights to the fruits of their creative labors.

Extrapolating from Locke’s labor theory of property, he conceives of intellectual resources as existing in a state of nature; removing them from that state requires our intellectual efforts and gives rise to a limited property claim.

Merges also drew support from Kant’s view of property as essential to autonomy. Taking up the argument that the IP market is increasingly dominated by large corporate entities who are the real stakeholders, he countered that this view is too simplistic because these companies support smaller creators and

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Alumna Marcia Paul Talks on Her Career in IP Litigation

Marcia B. Paul '72, a partner at Davis Wright Tremaine LLP, spoke at a lunch sponsored by the Kernochan Center on November 9, 2009. Ms. Paul has represented some of the world's leading media companies and luminary authors, including J.D. Salinger, whom she represented in cases in the 1980s and most recently this past summer.

She described her time as a student at Columbia Law School in the late 1960s and early 1970s and the transition to the quieter halls of Sullivan & Cromwell, where she worked for four years as a securities litigator. Eventually she found her way to intellectual property law, though she noted that, at the time, the concept of "IP law" had not yet been coined and firms tended to refer to entertainment practices or first amendment practices.

Paul discussed the wide range of cases she has worked on, including representing NBC in a copyright action involving the television program "Heroes"; the BBC in a breach-of-contract trial over its rock music archives; and Blockbuster and the producers of "Little House on the Prairie" in trademark actions.

Paul praised the virtues of variety in IP litigation, which has kept the work consistently engaging. She noted that litigants pursue IP cases for a number of reasons, ranging from the prospect of monetary rewards to, in many cases, the opportunity to assert control over their works and business practices. She is concerned about the ever-increasing costs of litigation, due in large measure to e-discovery practice, a

development that has resulted in a pressure to settle.

Paul outlined four changes in the practice of law she has observed since she started practicing. First, law firm practice has become much more entrepreneurial, resulting in higher lawyer turnover and more competition. Second, women constitute much more of a presence in legal practice: she noted that in her law school class, only 17 out of about 300 graduates were women. Third and fourth are the changes wrought by globalization and the Internet. These aspects mean that it is no longer sufficient to master U.S. intellectual property law alone; in fact, she said she very rarely has a case that does not have an international dimension. While the Internet has certainly facilitated efficiency in law practice in many ways, the trend in e-commuting by lawyers has had a negative effect on collegiality.

With respect to the current state of copyright law, Paul admitted that it is not working as it should in our globalized world. Similarly, companies must constantly evaluate branding and advertising practices as their goods increasingly travel across international borders. She maintained that we need global laws to reflect our interconnectedness. While she does not favor compulsory licensing regimes because they reduce authorial discretion, she suggested that they may be the best way to effectuate intellectual property protection going forward. One consequence of the law's tendency to lag behind technological shifts is the existence of exciting challenges for IP lawyers.

Visiting Scholars from Turkey, Estonia Study at CLS

Two rising scholars visited the Law School this Spring as part of the Kernochan Center's International Visiting Scholars program, sponsored by the Microsoft Corporation. Burak Özgen, a Turkish national studying at Ghent University in Belgium, and Aleksei Kelli from the University of Tartu in Estonia, spent eight weeks attending classes and conducting research in furtherance of their scholarly endeavors.

Özgen is currently writing his Ph.D. dissertation on cross-border collective management of copyright and related rights. He came to the law school to work with Professor Ginsburg, whose writings he admired. While at Columbia, he met with various music performing rights organizations, including BMI and ASCAP, in connection with his dissertation. Interested in the potential impact of the Google Books Settlement on the future of collective management, he attended the settlement hearings held in the U.S. District Court in February. He also attended various symposia and panels throughout the city which focused on current copyright issues.

Özgen also sat in on many intellectual property classes, which differed from those in his native Turkey, where classes are much larger, readings are not assigned in advance and the

format is lecture-based rather than centered around class discussion. One of the things that struck the future professor was how instructors here use lines of questioning to provoke students' thoughts and prompt deeper analysis. He plans on

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Kernochan Center Spring Symposium Focuses on Digital Archives

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Rasenberger of Skadden Arps LLP and Maria Pallante, Associate Register for Policy and International Affairs at the U.S. Copyright Office, then addressed the need for reform in Section 108 of the Copyright Act and possible legislation with respect to “orphan works.”

Later in the morning, Ricky Erway, senior program officer at OCLC Research, described the preliminary results from an OCLC research survey of university libraries. She discussed particular findings in areas such as programs undertaken; treatment of born-digital materials; private-public agreements; scan on demand; web harvesting and data curation.

Next Francis X. Blouin Jr., Director of the Bentley Historical Library and Professor at the University of Michigan, discussed web and e-mail archiving. He noted the importance of university archives as a source of information and as a record of institutional memory.

Professor Jane Ginsburg addressed the international issues raised when materials are digitized and made available over the Internet, and the ability of archivists to rely on fair use or foreign copyright law exceptions.

The overriding theme of the morning’s presenters was the tension between archivists’ desire to make their collections broadly available and the potential legal hurdles posed by domestic and foreign copyright and right of privacy laws. Peter Hirtle of Cornell

University, the final speaker of the morning, argued that archivists should not be overly cautious in making archival material available online when the risk of liability is relatively low and takedown is likely to avert a lawsuit in the event a complaint is raised.

The three afternoon panels were organized in the format of roundtables, in which archivists and lawyers discussed topical issues pertaining to digital archives.

The first roundtable, moderated by Kenneth Crews of Columbia University’s Copyright Advisory Office, addressed issues particularly pertinent to sound and video archives. The panel discussed the ambiguity of many of the relevant laws and the difficulty in identifying and locating rights holders, particularly as there are often multiple rights holders for sound and video recordings.

Robert Clarida (CLS ’93) of Cowan, Liebowitz and Latman was the moderator for the second roundtable, which focused on copyright issues concerning unpublished works, as well as contract, defamation and privacy issues. The panel emphasized the risk of libel and privacy laws in making private information (such as student or medical records) publicly available. The panel also discussed the legal implications of posting material online versus making it available onsite at an archives’ physical location. For example, online posting may be considered “publication,”

for purposes of defamation law, or a reproduction or distribution for purposes of copyright, potentially exposing the publisher to direct liability if the posted material is problematic. Panelists also discussed extra-legal issues such as equity, fairness and bad publicity.

June Besek was the moderator for the third panel, which was titled “How Do You Make a Decision When the Legal Answer is Maybe?” Panelists explained that an archive’s reaction to ambiguous legal situations necessarily depends on various factors, such as the user’s characteristics, the expected use of the material and the amount and nature of the information that is available regarding the work. They cited other factors that are not strictly legal that also should be assessed, such as the probability that a lawsuit will be filed, the client’s appetite for risk, and the availability of risk reduction measures. The panel then addressed ways to minimize the legal risk in ambiguous situations, including efficient notice and takedown systems. They noted that it is sometimes possible for an archive to reduce its risk by informing users of the materials that it is their responsibility to verify the status of the rights.

The proceedings of the symposium can be streamed from the Kernochan Center’s website, www.law.columbia.edu/kernochan. They will be published in an upcoming volume of THE COLUMBIA JOURNAL OF LAW & THE ARTS.

International Visiting Scholars Program Brings Two to CLS

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using this technique when he begins his teaching career.

Professor Aleksei Kelli had not been in the United States before arriving in January to learn more about American teaching and work with Columbia’s IP faculty. Columbia’s international reputation drew him to the fellowship opportunity since he concentrates his work on comparative IP law. In addition to working with CLS’

faculty, Kelli met and worked with faculty from a variety of area law schools in order to further his research on the American copyright system and create a dialogue between the Estonian and American copyright communities. Kelli noted that there were few surprises for him in America: “Students seemed to be the same as in Estonia,” he said. “[In class] some of them pay attention to what professors say, some of them play computer games.”



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Manges Lecture: Not a Choice Between Compensation or Control

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creative consultants. Rejecting the idea that as long as creators are compensated, their ability to control their works should be reduced, Merges said that protecting a degree of control actually fosters creative experimentation by artists in distributing and monetizing their works.

Merges further challenged the inevitability of technologically-driven outcomes. He pointed out that a claim that “cars want to go fast” because they are equipped with high-powered motors would not garner the popular currency that the equally anthropomorphic and deterministic adage: “information wants to be free” has come to enjoy. He offered an alternative to digital determinism: rather than letting technology dictate policy, policy should also accommodate the interests of original creators. He urged that we address digital technology through a tort lens, in which both its costs and benefits are considered. Just as we would require that potential harm be taken into account when designing consumer products, we should insist that, if there is a way to protect the rights of creators while preserving the function of new technologies, these rights should be

protected.

Merges concluded that without pay, artists may well still create for themselves, but we cannot expect that they will still contribute the fruits of their creative labors to society. For Merges, the traditional story holds—property still matters in

the digital era.

The text of the Manges Lecture will be published in an upcoming volume of THE COLUMBIA JOURNAL OF LAW & THE ARTS and the lecture can be viewed in its entirety on our new website, www.law.columbia.edu/kernochan.



Prof. Robert P. Merges greets June Besek and Jane Ginsburg after his lecture

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