



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

COLUMBIA UNIVERSITY SCHOOL OF LAW

WINTER 2005

Professor Jane Ginsburg Honored by Cambridge University

This year, Professor Jane Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, has been honored as the Arthur L. Goodhart Visiting Chair of Legal Science at Cambridge University. Professor Ginsburg is the first professor in the field of Intellectual Property Law, and the first woman, to hold this Chair at the law faculty at Cambridge since its creation in 1971. (She is also the first, and so far, only, woman to hold any full professorship at that law faculty.) The Kernochan Center spoke with her about her experience at Cambridge.

In the Fall, Professor Ginsburg delivered a lecture on current directions in copyright research, as part of a celebration in honor of Professor William R. Cornish. To mark Professor Cornish's retirement as Herschel Smith Professor of IP Law, his colleagues, including Professor Ginsburg, conferred a *Festschrift*, *Intellectual Property in the New Millennium, Essays in Honour of William R. Cornish*, to which they and former students had contributed. Professor Cornish was the 2003 Manges Lecturer at Columbia Law School.

While at Cambridge, Professor Ginsburg has been teaching a year-long seminar on international intellectual property law at the Law Faculty. Ginsburg explained that approximately half of those attending the seminar are teaching staff at Cambridge. "This is the first time a course like this has been offered here," she noted, adding that, "there has been a great deal of interest and participation of instructors that has kept the class at a high level." The seminar, which covers issues of international copyright, trademark and patent law, has focused on such areas as databases, communication to the public and secondary liability, technological protection measures, design protection, and domain names.

The format of the seminar has evolved from the way in which Professor Ginsburg

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Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, at the conferral of a *Festschrift* for Professor William Cornish.

Lovedy Cornish

Center Conducts Study on Legal Treatment of Digital Archives

The Kernochan Center recently completed the first phase of a study on the legal treatment of archives, sponsored by the Andrew W. Mellon Foundation. Archives and libraries dedicated to preserving the cultural record are increasingly concerned by the removal of materials from scholarly journals, and from databases containing those journals. Our study focuses on digital archives and seeks to determine how an archive can avoid the removal of documents from its collection.

Imagine, for example, an article published in a scientific journal, later discovered to contain falsified data. In a pre-digital era, the publisher would have little or no control over the article once it was published. It could publish a notice of retraction, indicating the discovery of the falsified data, but the hard copy record of the article would remain in the collections of libraries and archives. As archives and libraries become increasingly dependent on licensing access to digital subscriptions of scholarly journals, sometimes without subscribing to hard copies of these publications, the publishers and databases sometimes opt to remove questionable articles from their database or online archives, with little or no explanation. Archives' and libraries' commitment to avoiding such

removal of materials from their collections served as a catalyst for the project.

The Center's study identifies a number of reasons material may be removed from a digital archive, including copyright infringement, plagiarism, defamation/trade libel, expiration or invalidation of a publisher's rights, factual errors, fictionalized accounts, unsupported research or other misconduct, author or customer request, national security, privacy, censorship, and business disruptions. By identifying and examining situations in which materials are removed from archives' collections, and analyzing the available alternatives, the study aims to encourage policies and possibly legislation to protect the integrity of an archives' collection.

In Phase I of the study, we conducted extensive factual and legal research, and interviewed members of the library, archive and legal community concerned with preserving and protecting archives' collections. We examined U.S. copyright law provisions most relevant to archives, as well as applicable legislative history and case law. As digital archives made available over the Internet implicate the laws of other countries, we worked with consultants in Australia, Canada,

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IP Speaker Series Sparks Discussion and Debate



Karen Chesley

Roberta Smith of The New York Times

The Kernochan Center's IP Speaker Series has featured several lunchtime talks on intellectual property, arts and media issues this fall and winter. In November, Roberta Smith, an art critic for *The New York Times*, delivered a dynamic presentation on, "Something (Somewhat) Borrowed: Contemporary Art and the Image Bank of Culture." Ms. Smith discussed "appropriation art" and the challenges it poses to copyright law. Throughout art history, as Ms. Smith demonstrated with an impressive slide show, artists have appropriated imagery from other artists' work. Arguing that all art is a form of commentary, she believes all appropriation art should be considered fair use. Ms. Smith's lively lecture stimulated conversation and questions from the audience.

In conjunction with the Seminar on Advanced Topics in Copyright Law, taught by June Besek, a number of guest lecturers have debated and discussed cutting edge issues this semester. On January 18th, Andrew Bridges of Winston & Strawn and Jonathan Zavin of Loeb & Loeb offered diverging perspectives on "Authors' Rights and the Clear-Play/CleanFlicks Controversy." The attorneys represent opposing sides in *Huntsman v. Soderbergh* which pits movie studios and directors against two classes of defendants.

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Professor Jane Ginsburg Honored by Cambridge University

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taught it at Columbia in the past. Ginsburg has devised discussion problems for each session and has invited experts to the class to engage the participants in dialogue. For example, Victor Nabhan, President of ALAI, and formerly an advisor to WIPO helping to negotiate the revision of the copyright law in developing countries, visited the seminar this Fall. Nabhan sent the draft text of a developing country's copyright law to the seminar participants, who reflected on how the law might need to be revised to meet higher international standards, while preserving domestic cultural policies to the extent possible. Pleased with the dialogue fostered by the discussion problems, Ginsburg said she plans to incorporate them into the seminar she teaches at Columbia.

In conjunction with her Chair, Professor Ginsburg has been appointed a Fellow of Emmanuel College, where she has initiated an evening lecture series with her colleague, Professor Lionel Bently, who succeeded Prof. Cornish as Herschel Smith Professor, and is also an Emmanuel Fellow. The "Intellectual Property Evenings at Emmanuel College" on "current (and contentious) topics" are cross-disciplinary; they feature a presenter from one field and a commentator from another. One such evening, on the patenting of stem cell research, juxtaposed the views of a law faculty lecturer who specializes in biotechnology and the College Dean (the chaplain), whose comments reflected his expertise in medical ethics. Another evening, addressing peer-to-peer file sharing, brought together a Research Fellow at the law faculty and the Head of University Computer Services. Upcoming events in the series include "Plagiarism," presented by a College lecturer in the English department, with commentary by Professor Ginsburg. The evenings have sparked lively debate and discussion, and each is followed by a wine and cheese reception.

Creatively combining legal and epicurean research, Professor Ginsburg is currently organizing an evening lecture/wine tasting on "Protection of Geographic Indications (or

the law of the names of wines, cheeses and other good things in life)," in which the Chair of the Emmanuel College Wine Committee will comment on a law professor's presentation of the law of geographic designations. An oenophile, Professor Ginsburg noted that the Emmanuel College houses over 250,000 bottles of wine and port.

When asked what she has enjoyed most during her time at Cambridge, Ginsburg responded, "this is a remarkable place. . . it's 800 years old. . . the architecture is inspiring – albeit not necessarily the law building, a modern building whose sobriquet, the 'bread box,' recalls Columbia's. It's inspiring to know you're working in the top research institution in the United Kingdom." Professor Ginsburg also expressed her delight in the extraordinary amount of music and theater at Cambridge. As most Colleges have a chapel with an organ scholar and a choir, there is a vast amount of choral and chamber music on campus. Ginsburg noted that, "on any given night there are a dozen plays and several concerts (not including the choral music)."

Professor Ginsburg has also appreciated meeting scholars from diverse fields. She explained that in the College system around which Cambridge University is organized, Fellows come from a cross section of disciplines, as all subjects are taught in the Colleges. "The Fellows have lunch together at a very long table and it's customary to sit down next to the person sitting by the first empty chair," she ex-

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IP Speaker Series Sparks Discussion and Debate



Karen Chesley

Andrew Bridges, Esq., of Winston & Strawn and Jonathan Zavín, Esq., (CLS '73) of Loeb & Loeb.

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One set of defendants includes companies that physically cut and edit objectionable content from videos and resell the edited versions without permission from the copyright holders. The second class of defendants consists of companies, includ-

ing ClearPlay, that create and distribute software and/or specially enabled DVD players with preprogrammed time codes that cause the DVD players to skip scenes with nudity, sex, violence or obscenity. Zavín and Bridges debated over the appropriate balance between the rights of motion picture directors and other right holders to maintain the integrity of their works, and the rights of technology providers to distribute (and users to employ) devices that change the performance of a motion picture to eliminate objectionable content.

On January 25th, Joshua Fairfield, Associate-in-Law at Columbia Law School, delivered a fascinating lecture on virtual property, the rise of virtual worlds, and online property values in the global market. Discussing several types of virtual environments, he illustrated one in particular, Second Life, in which subscribers create their own virtual persona and interact with others. Fairfield emphasized the increasing popularity of such virtual communities, which allow users to conduct transactions, including purchasing property and selling both virtual and real products and services. How should U.S. law treat these virtual worlds? According to Fairfield, "This kind of code should be viewed as 'virtual property' and ought to be protected by the laws that govern real world property," rather than IP law. Fairfield is the former Director of Research and Development for The Rosetta Stone Language Library software.

Center Hosts Reality TV Panel



Dustin Ross

From left to right: Margo Crespín, Esq., Assistant Director, Kernochan Center for Law, Media and the Arts; Lee Straus, Esq., Vice President of Business Affairs, NBC Universal Television Network and Cable Group and Adjunct Professor of Law, Loyola Law School; Bill Rancic, first season winner of *The Apprentice*; Marci Wiseman, Esq., President, Wiseman & Associates and Business Affairs Consultant, NBC Universal Television Group; and Bob Kusbit, Executive Producer of MTV's *Made*, *Boiling Points* and *Camp Jim* and NBC's *Home Intervention* and *The One That Got Away*.

The Kernochan Center for Law, Media and the Arts welcomed reality television's leading executives in November for a panel titled "Reality Check: The Legal, Business, Financial and Creative Aspects of Reality TV." The event was co-sponsored with the Media Management Association of Columbia Business School.

Engaging in an informative and entertaining dialogue, panelists addressed a host of issues involved in the creation of reality TV programs, from risk management and due diligence performed on potential contestants, to contractual provisions agreed to by contestants, to the challenges of drafting release forms for shows involving hoaxes and hidden cameras. The event drew a crowd of nearly 200 people.

The panel explored the liability concerns of reality television. In an effort to protect themselves, networks require extensive testing of prospective subjects. Panelist Bill Rancic, the first-season winner of *The Apprentice*, said he was subjected to "every test imaginable, short of a full body cavity search." If contestants refuse the rigorous mental and physical tests, he continued, "There are 100 people in line waiting for your spot." Contestants also are expected to sign tomes-length documents essentially relinquishing all rights. But the influx of candid camera type shows, such as MTV's *Boiling Points* or NBC's *My Big Fat Obnoxious Fiancé*, where some parties are not aware they are being filmed, has increased the potential for liability.

Additionally, panelists expressed concerns over failed background checks which have caused tremendous embarrassment for certain shows. Some contestants with troublesome pasts have slipped through the cracks despite intensive background searches. For example, one contestant of Fox's popular *American Idol* was eliminated after his prior criminal record surfaced.

Despite news reports indicating that the popularity of reality programming may be waning, the panelists concurred that it will be an important component of the network and cable broadcast industry for the foreseeable future. Discovering solutions for the legal, ethical and economic problems posed by this new form of entertainment will remain a central challenge for these executives and their lawyers in the years to come.

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Professor Jane Ginsburg Honored

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plained. "So you may sit next to a theoretical mathematician, an art historian, or a scholar of the 19th century French novel." As a result of this custom, she has met experts from a variety of fields who have added their perspectives to the IP lecture series and inspired other projects. Currently, she is helping to plan a multidisciplinary workshop on Trademarks – from legal, marketing, and linguistic perspectives. Speakers from the fields of law, business and English will present four introductory papers to an invited audience that will include sociologists, anthropologists, literature scholars, economists and lawyers. The workshop, "Signs, Commodities and Communication: Interdisciplinary Approaches to Trade Marks" will explore what trademarks mean to the different participants.

Professor Ginsburg described another benefit of the coveted Arthur L. Goodhart Chair, one "which improves the quality of life" – it comes with a five-bedroom house replete with a garden in front and in back (the university supplies the gardeners). "One could get used to it," Professor Ginsburg admitted. "But it's semi-suburban – I cycle to work two miles each way each day (everyone bikes here), which is generally a good thing." When asked what, if anything she misses about New York, Ginsburg responded that, "it's an adjustment that you can't walk across the street to get milk when you run out; everything here takes more of an effort to get to, and shuts down at 6 pm." While she might miss the convenience and proximity that accompany living in New York, she confessed that, overall, "It's extremely idyllic. . . for a year, it's hard to imagine a better deal."

Center Conducts Study

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France and the United Kingdom to explore the legal conception of archives and any relevant provisions of their copyright laws.

The Center's proposal for the second phase of the study has been approved by the Mellon Foundation. While the first phase of the study addressed the legal treatment and understanding of "archives" under copyright law, in the second phase the Center plans to research the effect of other legal regimes, including tort liability for false and misleading information, and contract law. Ultimately, Phase II of study will analyze the Center's findings and offer legal and business recommendations to assist archives in preserving the integrity of their collections.

Please Join Us For
The Eighteen Horace S. Manges Lecture
to be given by

Paul Goldstein

Lillick Professor of Law, Stanford University
on

"COPYRIGHT'S COMMONS"

Monday, April 4, 2005, 6:00 P.M.
Columbia Law School, JG Room 103

For more information visit: http://www.columbia.edu/center_program/kernochan/Manges_Lecture#