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### Kernochan Center News - Fall 2007

Kernochan Center for Law, Media and the Arts

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

COLUMBIA UNIVERSITY SCHOOL OF LAW

FALL 2007

## Cambridge Professor Delivers 20th Annual Manges Lecture

Referring to the “Crime of Copyright Creep,” Professor Lionel Bently used the 2007 Manges Lecture to discuss the problems he saw in the current trend of blaming the author for the expansion of copyright in the United States and United Kingdom and to offer suggestions for why the expansion of copyright had occurred. In his lecture, “People v. The Author: From the Death Penalty to Community Service,” delivered April 10, Prof. Bently suggested that the harm of such expansion lies in – among other things – negative effects on free speech, the inhibition of creativity, and an increased price for consumers due to diminished competition. He concluded that, although there are no easy answers to the questions raised by copyright’s expansion, the author – rather than being the problem – could be part of the solution.

Bently, the Herschel Smith Professor of Intellectual Property at the University of Cambridge and the author of *INTELLECTUAL PROPERTY LAW* and *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW*, began by listing the kinds of expansion that have occurred: subject matter has been added, formalities reduced, the term of protection extended, the scope of the derivative work right increased, and exceptions limited. Professor Bently offered many different parties who could be blamed for these conditions, and queried why attention tends turn to the author. Specifically, some critics have identified 18<sup>th</sup> and early 19<sup>th</sup> century authors, such as the Romantic poet William Wordsworth and Edward Young, who wrote a 1760s text called *CON-*



Lynn Saville

Professor Lionel Bently delivers the 2007 Manges Lecture.

*JECTURES ON ORIGINAL COMPOSITION*, as the force behind the expansion of copyright. Bently noted that modern professors of law and literature point out that copyright developed at the same time as the ideas held by the Romantic poets, and claim that Romantic ideology contributed to the development of legal notions of originality. Bently disputed this claim, observing that technological developments have largely changed the field since

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## Alumnus Mark Morrill at Cutting Edge of Intellectual Property Law



Mark Morrill '72.

Mark Morrill '72 is working on what could be one of the most significant intellectual property suits in history as Viacom, where he serves as Senior Vice President and Deputy General Counsel, takes on Google in litigation that could make some of the country’s most popular websites liable for large-scale copyright infringement.

Morrill certainly didn’t start out his career thinking he would shape 21<sup>st</sup> century intellectual property law. He came to Columbia after graduating from Tufts as an Urban Studies major. Jack Kernochan and the Honorable Jack Weinstein were among his professors, and Judge Weinstein has remained a mentor throughout Morrill’s career. When he began a

clerkship with Judge Weinstein, Morrill was not committed to a career in litigation. It was only after working in the court, learning how judges deliberate and how cases are considered, that he decided to pursue a career in the courtroom.

After his clerkship, Morrill joined Legal Action Center, a public interest law firm chaired by the late famed litigator Arthur Liman. Legal Action Center provides legal assistance to those discriminated against because of a history of addiction, criminal conviction or HIV/AIDS. Morrill left Legal Action Center to become an associate at the law firm headed by Liman, Paul Weiss Rifkind Wharton & Garrison. Morrill remains a trustee of Le-

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## Panel Delves into Ethics and Future of Antiquities Collecting



John Sare, '90, Rebecca Noonan Murray, John Russell, and Jane Levine participated in a February panel.

On Tuesday, February 27, the Center presented "Ancient Objects in Modern Times: Perspectives on Preserving and Collecting Antiquities Today," a discussion about the issues confronting museums when they acquire and display antiquities. CLS Adjunct Lecturers Jane Levine, Senior Vice President and Director of Worldwide Compliance at Sotheby's, and John Sare '90 of Patterson Belknap Webb & Tyler LLP, were instrumental in setting up the event. They were joined on the panel by Prof. John Russell, an archaeologist and professor at Massachusetts College of Art, and Rebecca Noonan Murray, Associate Counsel at the Metropolitan Museum of Art.

Levine and Sare gave the audience

an overview of the topic. Levine highlighted seminal cases and put the current controversies in context. Sare, whose practice at Patterson focuses on laws affecting museums and other tax exempt organizations, discussed the pitfalls that museums face as they seek to expand their collections. The panel discussed recent incidents at the Getty Museum in Los Angeles whose curator allegedly acquired stolen antiquities and tried to cover up their questionable provenance by setting up purchases through a European dealer. Revelations such as these have had a profound effect on how museums acquire artifacts, and many museums have adopted policies governing the examination of a piece's provenance.

Becky Murray explained that museums are becoming increasingly careful when purchasing items. While in the past, a museum might take a leap of faith when purchasing an object, more and more museums are requiring extensive paperwork to support a dealer's provenance claims. Furthermore, museum administrators are becoming more sensitive to the desires of certain countries to have pieces of their cultural heritage returned to local museums and, thus, try to

strike a balance between keeping their collections intact and honoring the claims of nations whose property has been dishonestly taken.

Russell, just back from working on an excavation in Iraq, spoke on the current state of archaeological excavation in Iraq and Syria. Through a series of slides showing the pockmarked topography of southern Iraq, Russell demonstrated the damage caused not by bombshells but by the impact of looters' indiscriminate excavations. Later, during the question and answer session, Russell challenged the "10 year-rule" under which many museums have agreed not to purchase any artifact that does not have at least 10 years of documented provenance in the United States. Russell argued that this rule does not do enough to discourage looters from selling their finds to collectors.

Levine and Sare also spoke at Prof. Ginsburg and June Besek's afternoon seminar, Advanced Topics in Copyright. Levine and Sare are both Lecturers in Law at the Law School. Sare teaches a course entitled Law and Visual Arts and Levine teaches Art, Cultural Heritage and the Law.

## Bently Delivers 20th Manges Lecture

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the Romantic poets flourished around 1800. He added that historically authors were not influential in the development of many aspects of copyright.

Then who, or what, he asked, is responsible for the expansion of copyright? He suggested that there are other reasons for the expansion in both the US and the UK. In the US, one reason is corporate self-interest in the field of entertainment, manifested – for example – in the Copyright Term Extension Act, the 1998 law that extended the copyright term to life of the creator plus 70 years for most works. Another reason is a desire to conform to international standards. Bently hypothesized that the United States extended copyright terms because of trade issues, wanting to ensure extended protection of their exported works. In the UK, a factor was the Imperial Copyright Act of 1911, a law instigated by a desire to conform to international standards of the time and the needs of the internal European market. Finally, there is a neoclassical economic ideology, some of whose adherents advocate perpetually renewable copyright.

Bently noted that the "author construct" might actually provide a tool to limit further copyright expansion. Making the idea of authorship central to copyright might lead to the

recognition that copyright expansion can pose a danger to authorial creativity. If building on another work is potentially infringing, certain methods of creation would be hindered. He concluded that in any event, the promotion of authorship should still be the central idea in copyright – a concept which might both resist further expansion and aid in interpretation of copyright law.

Professor Bently, who is also director of the Center for Intellectual Property and Information Law at Cambridge, will be a visiting professor at CLS in the spring of 2008, and will co-teach a course in Comparative Trademark Law in the US and EU with Prof. Jane Ginsburg. The text of the Manges lecture will be printed in an upcoming issue of THE COLUMBIA JOURNAL OF LAW & THE ARTS.

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## Faculty, Staff News

In June, **Professor Jane Ginsburg** presented a paper at a conference sponsored by NYU's Engleberg Center on Innovation Law and Policy. Her talk was entitled "Contracts and Copyright Norms: What Role for Berne and TRIPs?". Later that month, she gave a talk on technological protection measures at the Universitat Oberta de Catalunya (Barcelona). July saw her at Emmanuel College, University of Cambridge, giving a workshop on "Imitation, Inspiration or Infringement? Interdisciplinary Perspectives on Copyright." She also finished contributing to and co-editing a book of essays developed from last year's Emmanuel College interdisciplinary IP conference: **TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE**, to be published in 2008 by Cambridge University Press. Professor Ginsburg also finished the fourth edition of her co-authored trademarks casebook and the co-authored 2007 supplement to her copyright casebook.

**Professor Clarisa Long** had a busy spring semester lecturing around the

country. She spoke at a Faculty Workshop at Emory Law School, the Trademark Dilution Law Conference at NYU and the Hot Topics in Intellectual Property Law Symposium at Duke Law School. This fall she will be a visiting professor at the University of Chicago School of Law, teaching an introductory trademarks course as well as a seminar on advanced issues in intellectual property.

**Professor Tim Wu's** book, **WHO CONTROLS THE INTERNET?**, co-authored by Harvard Law Professor Jack Goldsmith, continues to garner awards. The book was recently named runner-up for the American Society of Legal Writers' 2006-2007 Scribes Book Award. This award is given annually to exceptional legal writing. The book was also named one of the **LIBRARY JOURNAL's** Best Business Books of 2006.

A recognized authority on government regulation of the internet, Wu has spoken on the subject extensively in the United States and abroad. This summer

he presented a new paper on "tolerated use" at the University of Miami, Fordham University and at a workshop on Commons Theory in Bonn, Germany. "Tolerated Use" is Wu's theory that copyright is migrating from a standard where it is illegal to use protected works without the copyright owner's permission to a standard under which such uses are permitted as long as the copyright owner does not object.

On July 11, Wu testified before members of the House of Representatives at a House Subcommittee Hearing on Wireless Innovation and Consumer Protection. He recommended further regulation of the wireless industry. Concerned that consumers are faced with few choices and complex plans, Wu proposed allowing people to use their mobile phones on any wireless network and forbidding mobile providers from blocking access to certain applications or internet content.

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## Alumnus Mark Morril at Cutting Edge of Intellectual Property Law

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gal Action Center.

Morril worked on general litigation matters at Paul Weiss for several years. He left Paul Weiss for an entertainment boutique, Greenbaum Wolf & Ernst, where he focused on issues confronting the entertainment industry and continued to hone his litigation skills.

During his tenure at Greenbaum Wolf, Morril worked with the firm's many media clients, so when the position of General Counsel at Simon & Schuster opened, a friend urged him to apply. While at the publishing giant, Morril began to see the expansion of the internet and its effect on Simon & Schuster and its authors. He was instrumental in adapting the company's publishing agreements to reflect the publisher's changing needs in an expanding digital environment.

Simon & Schuster transformed Morril from an entertainment litigator to a generalist dealing with employment and intellectual property issues one day and corporate or financial issues the next. When Simon & Schuster was sold by parent company Viacom in 1998, Morril

remained with the parent company and took his current position. Viacom employs some 200 lawyers around the world, specializing in areas ranging from TV and motion picture production to mergers and acquisitions, real estate and securities. Morril also coordinates the operations of the enterprise-wide Law Department which includes MTV Networks, BET and the Paramount/DreamWorks movie studio.

As Deputy General Counsel, Morril deals with many areas of the law but spends much of his time on intellectual property issues. "The critical issue right now," he said, "is striking the right balance between the important goal of halting illegal distribution of copyrighted content on the internet and encouraging the development of legitimate services and innovation distribution platforms." He believes innovation is present not solely in internet distribution, but also in the proliferation of technological protection measures and other digital rights management technology. Digital rights management technologies should be seen as enabling creators rather than restricting end-users, he says, because they al-

low companies like Viacom to distribute content on multiple platforms.

Of primary concern in today's economy are the issues surrounding a website's liability for content posted by the site's users. Viacom is suing YouTube and its parent company Google for primary and secondary copyright infringement because YouTube carries Viacom's copyrighted content without permission or compensation. Viacom believes YouTube does not qualify for the "safe harbor" provision of Section 512 of the Copyright Act. Under Section 512(c), service providers enjoy a safe harbor from copyright damages arising from the activity of storing content at the discretion of a user, but only if they do not have knowledge of infringement and if they do not receive a financial benefit from the infringing content while having the right or ability to control it. (Sites must also take down any offending materials upon notice from the copyright owner and meet some other requirements.)

Viacom believes that YouTube has actual knowledge that its site hosts in-

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## Faculty, Staff News

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Audiences at Columbia, the Silicon Flatirons conference in Boulder, Colorado, and the Max Planck Institute in Bonn saw **Professor Scott Hemphill** present a new paper on recent proposals to impose "zero-price rules," which prohibit broadband Internet access providers from charging content providers to send information to consumers. At UCLA, the European Center for Competition Policy, the American Bar Association Antitrust Section's spring meeting, and seminars sponsored by LECG and the Conference Board, he presented new empirical work on patent settlements between rival drug makers at. This work also formed the basis for congressional testimony before a subcommittee of the House Committee on Energy and Commerce.

**Executive Director June Besek** has been deeply involved in the work of the "Section 108 Study Group," appointed by the Library of Congress to recommend changes to the library and archives exceptions to the Copyright Act in light of digital technologies. The Group's report is expected before year's end. Along with Prof. Ginsburg, she presented a paper at the June conference sponsored by NYU's Engleberg Center on Innovation Law and Policy. Besek's paper discussed the ongoing work of the Section 108 Study Group.

**Assistant Director Pippa Loengard** spent much of the summer working on a website created in conjunction with the Program on Law & Technology. The site, [www.keepyourcopyrights.org](http://www.keepyourcopyrights.org), will be an introduction to copyright for creators of all types. The site will explain some basic features of United States copyright law, give examples of generous and restrictive contract language, and provide a glossary of terms. The site will launch on September 19 when the Center and the Law School celebrate the 15<sup>th</sup> anniversary of the Morton L. Janklow Chair of Literary and Artistic Property Law.

## Alumnus Mark Morril

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fringing content, that it controls what appears on its site while reaping financial gain from the infringements and that it does not comply adequately when notified of the illicit content. Furthermore, Viacom alleges that YouTube does more than store user-posted infringing material on its site, pointing to such YouTube interventions as marking all videos with the company's logo and otherwise enhancing the value to the user. Google denies these allegations and says that it removes any infringing material as soon as a complaint is made. In Morril's view, YouTube is a content website that has reason to know infringing material is being posted and, hence, it is required to prevent infringement and not just respond to content owners' takedown notices.

Morril sees the regulation of intellectual property as a worldwide issue. While some developing countries exploit IP for profit, others – especially those in the midst of economic or political upheaval – have weak intellectual property regimes that fail to encourage their citizens to create by protecting their intellectual property rights. Some of these countries also disregard international copyright laws, dissuading other nations from distributing their products in these regions. Shoring up intellectual property protections in these countries can help them on the path to growth and development, says Morril.