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Kernochan Center for Law, Media and the Arts

KERNOCHAN CENTER
FOR LAW, MEDIA AND THE ARTS

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IP LEADERS BRING THEIR EXPERTISE TO CENTER'S SPEAKER SERIES

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***Jonathan Band**, **Esq.** and **Lois Wasoff**, **Esq.** discuss "Cambridge University Press v. Patton: Fair Use and Course Websites" on February 14*

The Kernochan Center Spring IP Speaker Series began again in January when former Center Fellow Brad Greenberg joined Katherine Fallow from the Knight First Amendment Institute at Columbia to discuss the copyright implications of news aggregation. Greenberg noted that news aggregators have been around since clipping services began at the turn of the 20th century, and courts have been attempting to balance the copyright and trademark interests of the aggregators and their sources ever since.

Greenberg presented an overview of American jurisprudence related to news aggregation. He noted that the European Union has proposed laws that would require press publishers' authorization for news aggregation, but Congress has not entertained the adoption of similar legislation in America. He observed that recent cases such as *Fox News v. TVEyes* (SDNY 2014, appeal pending) and *Associated Press v. Meltwater* (S.D.N.Y. 2013) show that news aggregators are challenging the

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DAN ABRAMS '92 SPEAKS ON MEDIA AND THE COURTS IN THE TRUMP ERA

ABC News Chief Legal Affairs Correspondent and founder of Mediaite.com, Dan Abrams '92, spoke to a packed house on February 22.

Photos: © Bruce Gilbert

***Dan Abrams** '92*
Chief Legal Affairs Anchor, ABC News CEO, Founder, Abrams Media

Saying he could not have achieved all he has without his Columbia Law degree, he noted that the mission of the media is often diametrically opposed to the mission of the law. Media analysts search for quick sound-bites and simplified storylines, whereas legal professionals are taught to slowly analyze all aspects of a case before issuing a statement. Furthermore, "the legal system seeks justice on a systemic level – we exclude confessions that have been incorrectly obtained, for instance. The media doesn't."

Abrams thinks that too often attorneys dismiss the role the media plays in trials, yet blames the press when the verdict is not as they wish. Meanwhile, he noted that the public distrusts the media and the courts more and more, as they see judges as having political agendas rather than being impartial arbiters of justice.

As social media's presence grows, this distrusts deepens. Abrams hopes that the public will look deeper into the issues and follow policy rather than politics.

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boundaries of fair use and operating at the expense of those entities who invest in gathering and reporting the news. Fallow argued that no legislation aimed at protecting traditional news outlets from news aggregators would pass First Amendment scrutiny as any protections would be favoring one type of speech over another. Furthermore, she said, it would be unfair to allow fair use only in situations (such as in *Authors Guild, Inc. v. Google, Inc.* (2nd Cir. 2015), where the aggregator could afford high-end security for its database).

The next week, Kirkland & Ellis' Dale Cendali and Robert Clarida '93 of Reitler Kailas & Rosenblatt LLC, brought students up-to-date on recent developments in fair use. After giving a background on fair use jurisprudence, Clarida and Cendali focused the discussion on the doctrine of transformative use and the differences in courts' application of the doctrine.

Cendali, who represents the plaintiff in *Fox News v. TVEyes*, said that whether a use is a non-infringing transformative use often depends on the user experience. Cendali pointed out that in *Authors Guild v. Hathi Trust* (2nd Cir. 2014), the court ruled for the defendant because the service allowed users to find information about what was contained in books without providing excerpts, while in the Google Books case, the court again found the service transformative because Google limited its output of expression from the scanned books to "snippets." These would not be aggregated to reconstruct the entire book.

Attorneys Jonathan Band and Lois Wasoff were the third presenters in our Speaker Series. They discussed fair use in the context of on-line course materials. Focusing on the *Cambridge University Press (CUP) v. Patton* case now before the Eleventh Circuit for the second time, the speakers agreed that the conflict between the district and appellate courts has been unusually pronounced, leaving the ultimate outcome of the case difficult to predict. Band thought the district court judge's apparent bias against the plaintiff stemmed from a suspicion that the students' use of online materials did not in fact harm CUP, but rather, CUP was advancing other publishers' claims as well as its own claim to increased licensing fees. Band also argued that the works at issue were not creative works, but the expected output of university faculty who did not need copyright to incentivize their work. Wasoff countered that copyright law covers writings of all kinds and does not delve into creators' motivations. Moreover, she added, there was a clear licensing market for these works which Georgia State University circumvented.

TRADING IN IP: COPYRIGHT TREATIES AND INTERNATIONAL TRADE AGREEMENTS

The 2016 Kernochan Center Symposium, "Trading in IP: Copyright Treaties and International Trade Agreements," took place on Friday, October 14.

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Probir Mehta, *Assistant US Trade Representative for Innovation and Intellectual Property, and* ***Steven Metalitz*** *of Mitchell, Siberberg & Knupp LLP and Counsel to the International Intellectual Property Alliance*

The symposium focused on the role of international copyright treaties and free-trade agreements (FTAs) in copyright law. It fostered discussion around key themes such as the significance of IP industries in the US economy and their dominance in international markets; the challenge for countries in ensuring international compliance and effective dispute resolution; the impact of, and sometimes complications caused by, treaties and FTAs in shaping domestic copyright norms; and whether there is a need to incorporate more exceptions into the international framework.

The symposium brought representatives from government, international organizations, private practice, and academia to CLS. Probir Mehta, Assistant US Trade Representative for Innovation and Intellectual Property, and Steven Metalitz of Mitchell, Siberberg & Knupp LLP and Counsel to the International Intellectual Property Alliance gave keynote talks, discussing the legal landscape of copyright treaties and FTAs; their benefits and disadvantages; and how copyright obligations in FTAs may differ from those in international treaties.

Noting that "IP and copyright have been an essential element in trade agreements for more than 20 years," Mehta provided an overview of some of the most recent develop

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TRADING IN IP: COPYRIGHT TREATIES AND INTERNATIONAL TRADE AGREEMENTS

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ments in the current landscape of international copyright and trade agreements, focused in particular on the Trans-Pacific Partnership (TPP) as the latest expression of copyright in an FTA.

He pointed out that "95% of the world's consumers live outside the United States, and with our comparative advantage being innovation and creativity, being able to trade that has been a strategic imperative." Metalitz underscored the important advances made in strengthening copyright worldwide by including copyright provisions in trade agreements.

The first panel of the day focused on whether international copyright treaties and trade agreements change global norms and how they affect domestic norms in the US or in other countries. Karyn Temple Claggett '97, Director of Policy & International Affairs at the US Copyright Office (now Acting Register of Copyrights), led off the second panel by explaining ways in which US objectives have impacted copyright agreements worldwide. According to Claggett, "It is fair to say that the United States learned its

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***Sean Flynn**, Associate Director for the Program on Information Justice and Intellectual Property at The American University Washington College of Law*

lesson from the Berne Convention experience. Copyright isolationism doesn't work, especially in an increasingly global world. So the trend, at least in the United States, is to have an early seat at the table and to encourage adoption of international agreements that reflect the high standards of the United States copyright system."

Professor Ysolde Gendreau of the Université de Montréal expressed concern that Canada's implementation of international treaty obligations has complicated and encroached on Canada's ongoing endeavors to modernize its Copyright Act in light of technological developments. Krista Cox, Director of Public Policy Initiatives at the Association of Research Libraries, agreed with Gendreau's point and cautioned that multi-lateral IP treaties can constrain domestic IP policy.

Eric Schwartz of Mitchell, Silberberg & Knupp LLP countered that countries agree only to terms that they are willing to implement and that certain countries may be willing to forfeit some IP goals in an effort to gain an advantage in another part of the trade agreement.

The second panel of the day addressed enforcement and dispute resolution. Maria Strong, Deputy Director of Policy and International Affairs at the US Copyright Office, began by discussing some of ways the US uses trade tools to work with other countries to improve their compliance with international copyright norms.

Sean Flynn, the Associate Director for the Program on Information Justice and Intellectual Property at The American University Washington College of Law discussed bilateral initiatives to enforce IP rights and the issues presented by regime-shifting in the area of international IP. In particular, he pointed to current attempts to shift enforcement out of the traditional state-to-state mechanisms provided for under treaties such as NAFTA, and into settlement through the trade investment provisions of new treaties. The problem with this new structure, Flynn added, is that it does not provide for judicial review and appeal, but leaves the decisions to a body whose background is not in IP, but in trade investment law.

Antony Taubman, Director of the Intellectual Property Division of the World Trade Organization (WTO), discussed some of the issues concerning the nature of dispute settlement currently before the WTO. "Essentially, TRIPs reframed the international law of IP by saying that 'indeed, IP is trade-related.'" This, he explained, has put on the table questions concerning the "core concept of the dispute settlement system" that go from being quite abstract to being of enormous practical significance.

Steven Tepp, President and Founder of his own IP consulting firm, Sentinel Worldwide, discussed how these agreements are negotiated, focusing on how implementation strategies are finalized.

The final panel of the day covered efforts to incorporate exceptions, such as a "fair use"-type exception, into international copyright treaties and FTAs. David Carson, Head of the Copyright Policy Team, Office for Policy & International Affairs at the US Patent and Trademark Office, explained how bilateral and multi-lateral agreements currently treat limitation and exceptions. Attorney Jonathan Band analyzed the exceptions in the TPP Agreement and Stan McCoy, President and a Managing Director of the Motion Picture Association, considered whether or not fair use should be included in these types of treaties.

Professor Lital Helman of Ono Academic College Faculty of Law in Israel and a former Kernochan Center Fellow, wrapped up the session by discussing the adoption of the fair use doctrine in Israeli copyright law in 2007 and noted that Israel's success in passing a fair use exception may be a positive bellwether for other countries to integrate such an exception into their copyright laws in the future.

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KERNOCHAN CENTER FALL EVENTS IN REVIEW

The Center held two lunch-time talks this past Fall. In October, Reitler Kailas & Rosenblatt LLC's Robert Clarida '93 and Andrew Sparkler of Downtown, a music rights management company, spoke on the use of copyrighted music in political campaigns.

They explained the laws that apply when a candidate wants to use a musical work, whether during a convention or at a campaign rally. Arenas where the political conventions are held generally have blanket licenses for the performance of musical compositions, but what about music used on campaign stops or in commercials? With respect to sound recordings, Sparkler explained that even if an artist opposes a candidate's positions, he or she may not be in a position to stop a song from being licensed to the politician's campaign. But, Clarida noted, there are claims other than copyright, such as Lanham Act and Right of Publicity claims, that might provide an artist with means to curtail the politician's use.

In November, the Center welcomed archaeologist Michael Danti, cinematographer Tim Slade, and private practitioner Leila Amineddoleh who led a discussion of the effects of ISIS' looting in Syria. The program began with a clip from Slade's movie, "The Destruction of Memory," which profiles those working to salvage the cultural history of the Middle East in times of war. Amineddoleh then discussed the history of looting, focusing on recent situations in Iraq and Afghanistan, yet noting the practice's occurrence in Antiquity as well. Danti had just returned from Syria, where he worked with the United Nations on instituting measures to preserve some of the country's remaining cultural treasures and stem the tide of exports of looted goods to the West. He traced the different channels ISIS uses to gather profits from Syria's rich heritage, and explained how this state-endorsed pillaging differs from the looting in Iraq, for instance, where individuals rather than state-sanctioned actors plundered the landscape.

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