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KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS

Summer 2017

SHIRA PERLMUTTER DELIVERS THE 30TH MANGES LECTURE



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Shira Perlmutter delivered the 30th Manges Lecture, "Toward a Global Copyright Law?" on April 3, 2017

Shira Perlmutter, Chief Policy Officer and Director for International Affairs at the Patent and Trademark Office, delivered the 30th annual Horace S. Manges Lecture on April 3rd. Her talk, titled "Toward a Global Copyright Law?", provided not only an analysis of the pros and cons of global harmonization of copyright laws, but also set goals for future international agreements. She noted that as trade negotiations expand and national economies become more intertwined, common goals take on greater importance.

While the United States' current bilateral and multilateral treaties tend to reflect US law and address enforcement only in the broadest terms, Perlmutter suggested that international agreements should, in the future, focus on uniformity in general goals and principles regarding a wider range of issues, yet allow greater flexibility in each country's implementation.

Perlmutter acknowledged the importance of individual countries' culture and priorities, but also stressed the positive aspects

(Continued on page 2)

SPRING SPEAKER SERIES CONCLUDES WITH TALKS ON MUSIC, FASHION

The second half of the Center's Spring IP Speaker Series focused on issues as diverse as music licensing, secondary liability and fashion. Jacqueline Charlesworth, a former General Counsel



Jacqueline Charlesworth

at the US Copyright Office and primary author of its recent report, "Copyright and the Music Marketplace" who is now at

Covington & Burling, and Paul Fakler of Arent Fox, discussed the consent decrees which allow performing rights organizations (PROs) such as ASCAP and BMI to license non-dramatic public performance of musical compositions. The consent decrees provide, *inter alia*, for "rate courts" to set licensing fees where

the PRO and licensee cannot agree on licensing terms. There have been disagreements about the terms of the consent decrees over the years, but recently, issues concerning appropriate rates for new technologies and right holders' requests for the ability to withdraw a portion of their rights held by the PROs led the PROs to seek changes in the consent decrees from the Department of Justice.

In August 2016, the DOJ refused to alter the terms of the consent decrees to allow partial withdrawal of rights by ASCAP or BMI members. BMI, ASCAP and music publishers had asked the DOJ to allow music publishers the ability to partially withdraw rights from the PROs, allowing them to separately negotiate agreements with digital services such as Pandora. In the same August 2016 Statement, the DOJ also ruled that PROs must offer "full-work" licenses and cannot offer fractional licenses in a work. The DOJ subsequently sued BMI for a declaratory judgment, but in September 2016

Judge Louis Stanton ruled that fractional licensing is allowed under the consent decrees covering the PROs, *United States of America v. Broadcast Music, Inc.*, 207 F.Supp.3d 374 (2016). The DOJ appealed this ruling in May of this year. Fakler applauded the DOJ's holdings, contending that potential licensees should not have the burden of locating and negotiating with individual rightholders. He also noted the problems inherent in PROs which, he said, limit competition and, thus, potentially inflate license fees.

Debevoise and Plimpton's Jeffrey Cunard and Durie Tangri's Joseph Gratz

(Continued on page 3)



Paul Fakler

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(Continued from page 1)

of harmonization. These benefits include more efficient international enforcement; the lessening of burdensome transaction costs; a greater worldwide recognition of the value of creative works; and the facilitation of cross-border licensing.

She also noted concerns that stakeholders have offered regarding globalization: the desire for nations to address issues locally, especially given differences in legal systems, economies and national goals from country to country. But, she countered, optimally-functioning markets and the promotion of important global norms (while still preserving reasonable space for countries to experiment and diverge) outweigh these concerns.

Addressing why she thought trade agreements were preferable to an organic harmonization over time, Perlmutter said formal agreements can be developed more quickly, establish mechanisms for resolving disputes, and tend to provoke other parties into entering similar agreements.



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From Left to Right: Philippa Loengard, Kernochan Center Deputy Dir.; Shira Perlmutter; Jane Ginsburg, Center Faculty Dir.; and June Besek, Center Executive Dir.

CENTER, LAW SCHOOL AWARD IP PRIZES AT 2017 GRADUATION

The Kernochan Center would like to congratulate the Class of 2017, particularly those who won awards for their IP scholarship.

Beatrice Kelly and Adam Aukland-Peck received the Carroll G. Harper prize for outstanding achievement in intellectual property studies.



Adam Aukland-Peck

Kelly was Editor-in-Chief of THE COLUMBIA JOURNAL OF LAW AND THE ARTS, a research assistant for the Kernochan Center, and took numerous IP classes and seminars, including the VLA externship.

She came to Columbia to pursue her joint interests of art and the law and hopes that she can continue to work with artists as her career progresses. First, however, she will join the US Securities team of Herbert Smith Freehills LLP in London. "With Brexit, it's an exciting time to be a capital markets lawyer in London! Later in my career, though, I would love to combine my passion for intellectual property with my transactional experience, possibly even continuing to work with capital markets in a field like theatre financing," Kelly said.

Adam Aukland-Peck came to Columbia because it gave him a chance to live in New York City, but he says it

is the friends and mentors he made through the AIPLA IP Moot Court competition that made his time here memorable. The 2Ls and 3Ls who encouraged him to join were "incredibly important in sharing their knowledge and experience on all aspects of navigating Columbia Law, from class choice to firm interviews, and much more. They also became some of my closest friends!"

After taking the Bar Exam this summer, Aukland-Peck will travel to South Africa and London before starting at Debevoise & Plimpton LLP this Fall. At Debevoise, he hopes to work in the areas of trademarks and false advertising, with a goal of perhaps one day working in the US Attorney's Office.

The Michael D. Remer Prize is awarded to the graduating student whose activities and academic achievements demonstrate an interest in and aptitude for the fields of arts and copyright law.

This year's recipient was Amy Lehrburger. Lehrburger's interest lies in the intersection of visual art and the law, and she came to Columbia because of its strong offerings in the field. Her Note, "You Be the Judge: An Analysis of the College Art Association's Code of Best Practices in Fair Use for the Visual Arts," 40 COLUM. J. L. & ARTS 237 (2017) has



Beatrice Kelly

(Continued on page 3)

CENTER, LAW SCHOOL AWARD IP PRIZES AT 2017 GRADUATION

(Continued from page 2)



Amy Lehrburger

already received positive mention in the arts law press.

Lehrburger excelled in her academic studies while at CLS. She took a varied course load which included seminars in law and the visual arts and advanced topics in copyright; classes in media law; and the arts law externship and community enterprise clinic.

She was also Executive Notes Editor of THE COLUMBIA JOURNAL OF LAW AND THE ARTS. Lehrburger will join Skadden Arps' Intellectual Property and Technology Transactions group after taking the bar exam this summer.

Trevor Reed received the Andrew D. Fried Prize for his Note, "Who Owns Our Ancestors' Voices? Tribal Claims to

Pre-1972 Sound Recordings," which was published in THE COLUMBIA JOURNAL OF LAW AND THE ARTS, 40 COLUM. J. L. & ARTS 275 (2016).

Trevor, who will receive a joint J.D.-Ph.D. in 2018, is a Native American who has worked throughout his time at Columbia advocating for rights of indigenous people.

His career goals are to teach and work with creators to support the development of new works by members of underrepresented communities.

Reed is a classically-trained composer whose most recent work, a new piece of Hopi music, was performed in the Grand Canyon in 2015.



Trevor Reed

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SPRING SPEAKER SERIES CONCLUDES WITH TALKS ON MUSIC, FASHION

(Continued from page 1)



Jeffrey Cunard

discussed whether section 512 of the Digital Millennium Copyright Act placed too great a burden on Internet Service Providers (ISPs). Cunard argued that courts have interpreted the statute so narrowly that they rarely find ISPs contributorily or vicariously liable for infringement. Gratz countered that legal uncertainty in this area of the law forces ISPs to be

overly cautious, removing even non-infringing material and limiting user access to creative output. Despite his misgivings about the statute, Gratz opposed revising the law, saying that, while imperfect, changes would only add to the confusion.

The final panel in the Speaker Series featured Faculty Director Jane Ginsburg and Fordham Law School Professor Susan Scafidi, who discussed the recent Supreme Court ruling in *Star Athletica v. Varsity Brands*, 580 U.S. ___ (2017).

Star Athletica assessed whether the chevron markings on a cheerleader uniform were eligible for copyright protection. The Supreme Court ruled that if the adornment could

exist independently of the garment and be perceived as a pictorial, graphic or sculptural work, then it was protectable.

While ruling the "surface decoration" on the cheerleader uniforms protectable, the Supreme Court rejected some of the tests previously applied by appellate courts, such as inquiries into the influence of functional objectives on the design process or into the marketability of the article as a purely decorative item.

Scafidi questioned whether this ruling would allow innovative designs of entire garments to receive protection as well, and posited that Congress should enact new legislation specifically tailored to the fashion industry, perhaps offering a more limited term of protection for fashion designs than works under copyright enjoy.



Joseph Gratz



Susan Scafidi

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SAVE THE DATE

Monday, September 18, 2017

**Alumni in IP and
Entertainment Law Panel**

SAVE THE DATE

**Friday, October 6, 2017
Annual Kernochan Center
Symposium
“Flexibilities in Berne and
Other IP Treaties”**

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