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News From the Kernochan Center Early Summer 2021

August 16, 2021

KARYN TEMPLE DELIVERS 33RD ANNUAL HORACE S. MANGES LECTURE

On March 15, Karyn A. Temple '97, Senior Executive Vice President and Global General Counsel of the Motion Picture Association of America (MPAA) delivered the 33rd annual Manges Lecture. Her talk was titled, "Beyond Whack-A-Mole: Content Protection in the Age of Platform Accountability," and gave an overview of the history of copyright laws regulating the internet and how new legislation is both necessary and, perhaps, forthcoming. Temple began her speech noting that in 1990, when the Digital Millennium Copyright Act was introduced, only seven judicial opinions mentioned the word internet. Thirty years later, Google performs over two billion searches a month. Early laws, she noted, were purposefully vague as Congress feared overregulation would adversely affect the burgeoning internet industry. Piracy, however, has been a content-producer's concern from the beginning, and cases such as *Napster* and *Grokster* showed not only the harm that could be done through piracy, but courts' unwillingness to rein in the tech industry. The refusal of Congress to adopt the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) (proposed legislation which would have curbed access to internet sites known for hosting pirated material and also barred financial institutions from processing transactions with those sites) in 2012, prompted by a coordinated display of force by the Internet Service Providers (ISPs), was, Temple said, the apex of the anti-regulation movement. While there is still rampant piracy in 2021 (Temple highlighted the 53 billion visits to movie piracy sites in 2017 alone), Congress has begun to address the problem despite the continued resistance of ISPs to legislative regulation. Encouraged by the Judiciary Committee's hearings in 2020 and then IP Subcommittee Chairman Thom Tillis' proposed revision of section 512, Temple noted that hope may be on the horizon. She concluded by saying that courts must continue to be balanced in their analysis, not continuously favoring technology over content, and that legislative changes, such as the adoption of a notice-and-stay-down regime, might finally even the playing field for all parties. We are unfortunately unable to share video of Ms. Temple's talk, but the entirety of the lecture will appear in a forthcoming issue of *The Columbia Journal of Law & the Arts*.

SPRING TALKS CONCLUDE

Jennifer Mass: Issues of Art Authentication

On March 11, [Dr. Jennifer Mass](#) of Scientific Analysis of Fine Art, LLC, gave a talk on the many techniques which can be used to discover the true history of an artwork. She detailed her laboratory's work on a painting, *Fraude dans le jardin*, which was attributed to French Surrealist [Yves Tanguy](#). The painting emerged from a murky background, as many artists in Tanguy's circle specialized in forging one another's work to raise funds for the French Resistance in World War II. Furthermore, photographic evidence showed the painting with a slash through it, after a right-wing group rioted at a screening of *L'Âge d'Or* and destroyed the surrealist works on display in the lobby. Scholarship suggested that the apparently undamaged painting which appeared at Christie's must be a forgery -- however, Dr. Mass, by employing multispectrum analysis (ultraviolet, infrared, and x-ray), as well as chemical analysis of the physical materials, suggested a more complicated status. The x-ray revealed that canvas had indeed been slashed, but then had been painstakingly repaired. Ultimately, Dr. Mass and her team were able to show that, while the biomorphic figures of the painting were genuinely Tanguy's work, the entire background had been over-painted. Thus, while not strictly a forgery, the work was no longer original to the standard most museums require.

Dr. Mass stressed the importance of collaboration between scientists and art historians, as well as multispectrum analysis, in establishing the authenticity of works. She also suggested that there is a need for databases of artists' work, to allow scholars to cross-reference techniques and materials.

Due to complexities involved with image permissions, we are unable to share video of Dr. Mass's talk.

Dale Cendali and Joe Gratz: Recent Developments in Fair Use

On March 23, as part of the IP Speaker Series, Kirkland and Ellis' [Dale Cendali](#) and [Joe Gratz](#) of Durie Tangri LLP discussed current issues in fair use. They summarized several recent cases which have interpreted the first factor of the test - the purpose and character of the use - in different ways. Cases covered included the decisions in *Warhol v. Goldsmith* (382 F. Supp. 3d 312, SDNY 2019, *rev'd* by 992 F.3d 99 (2d Cir. 2021)); *Dr. Seuss Enterprises v. Comic Mix* (372 F. Supp. 3d 1101 (S.D. Cal. 2019)) *rev'd* by 983 F.3d 443 (9th Cir. 2020), and *Tresona Multimedia v. Burbank High School* (953 F.3d. 638 (9th Cir. 2020)), which focused on the use of a copyrighted song by a high school show choir. A video of the talk can be found [here](#).

Nancy Kopans and Nathan Kelber: Text and Data Mining

Data mining and text analysis were the subject of a March 30 talk by [Nancy Kopans](#), Vice President and General Counsel at [ITHAKA](#), and [Nathan Kelber](#), a data analyst at [JSTOR](#). Kelber spoke on how lawyers can use text analysis to further social justice by using digital tools to search for bias in case law and legislation. He noted that using the internet to

conduct research allows lawyers to find evidence that might otherwise be overlooked, and the ability to use these methods adroitly is key to today's legal practice. Kelber detailed the five steps to text analysis and how each one can provide information not readily seen when reading a case. Kopans discussed the copyright issues that can arise from gathering this data and the role of fair use in cases where the creation of accessible digital libraries have been challenged. See the full talk [here](#).

Kimberley Isbell and Brad Greenberg: DMCA Section 512

[Kimberley Isbell](#) and former Kernochan Center IP Fellow [Brad Greenberg](#), attorneys at the United States Copyright Office (USCO), spoke on April 6 about the USCO's 2020 [study of Section 512](#). Both attorneys worked on the project, which took five years and included a large amount of public input. The report touched on many of the most controversial areas of the Digital Millennium Copyright Act, such as its notice and takedown provisions; repeat infringer policies; and whether internet copyright policy should be standard for all ISPs or vary depending on an ISP's size. Isbell and Greenberg discussed the USCO's findings and the possibilities for legislative reform. View the April 6th talk [here](#).

Nicholas O'Donnell: [The Limits of] Using FSIA to Litigate Nazi-Looted Art Claims

Art lawyer [Nicholas M. O'Donnell](#) spoke on April 8 about his recent case before the Supreme Court, *Federal Republic of Germany v. Philipp* (592 U.S. __ (2021)), and the role of the Foreign Sovereign Immunities Act (FSIA) in Nazi-art repatriation cases. The FSIA was adopted in 1976 and dictates that sovereign nations are immune from suit in the US unless certain conditions are met, one of which is if the claim at issue concerns rights in property taken in violation of international law, and the foreign state still engages in commercial activity in the United States. The FSIA as a prosecutorial tool in these kinds of cases first gained notice in *Altman v. Republic of Austria* (541 U.S. 677 (2004)) and has, since then, met with various levels of success. Philipp's case involved the Guelph Treasure, which, heirs claim, was sold by their German relatives to the Nazis under duress in the years leading up to World War II. The Supreme Court denied the claim, writing that the FSIA was not a human rights law, but an expropriations law and did not apply to the seizure of a property belonging to a country's own citizens. Mr. O'Donnell's presentation can be found [here](#).

KERNOCHAN SYMPOSIUM: The Restatement of Copyright Law: Past, Present, and Future

This year's symposium was held virtually on April 23 and focused on the American Law Institute's draft Restatement of Copyright. Panels discussed the process of drafting a restatement where there is a governing statute, how the Restatement deals with the originality requirement, and whether there is a need for such a document at all. Panelists included academics, private practitioners and members of the judiciary. Video of the entire event is available [here](#).

ALUMNI NOTES

Kernochan Center Board Member Joshua Simmons '10 was [featured on the CLS website as a “Lion of the Law.”](#) Simmons discusses his interests as an IP lawyer, his experience at Kirkland & Ellis, his background with Columbia Law and the Kernochan Center, and his pro-bono work, including the cases of several LGBTQ+ asylum seekers. This April, he received the Judge Deborah A. Batts Award for Queer Visibility at the annual Out in the Law Gala, organized by student groups [OutLaws](#) and [Queer and Trans People of Color](#).