Annual Symposium Analyzes Fair Use – Past, Present and Future

Paul Goldstein, the Lillick Professor of Law at Stanford Law School, gave the keynote speech at the Center’s 2007-2008 symposium held on February 8. The day-long event entitled “Fair Use: Incredibly Shrinking or Extraordinarily Expanding?” focused on how the courts have interpreted Section 107 of The Copyright Act in the past and how some scholars envision its future. Goldstein began his speech invoking Herman Melville, calling fair use the “great white whale” of American copyright law, because it fascinates and cannot be subdued. Because the written law often conflicts with the law in action, it stirs an endless amount of discussion, he said. Like many aspects of copyright law, it generates much controversy. Goldstein suggested that courts should decide cases based on categories and not blindly impose the four-factor test, adjusting the categories for new technologies and accommodating international treaties as necessary.

The first panel of the day picked up where Goldstein left off and further analyzed fair use jurisprudence. Laura Heymann from The University of Virginia asserted that courts err when they focus on the author instead of the reader. She believes a transformation should not be regarded as substantial if it does not change readers’ perception of the work. Echoing that perspective, Georgetown’s Rebecca Tushnet urged that fair use be defined by what readers think—not what legal analysis concludes—and suggested that the creator should not exercise complete control over a work, especially with respect to non-commercial uses. Tony Reese from The University of Texas–Austin shifted the panel’s focus to a discussion of the differences between derivative works and transformative uses and the difficulties the courts have in determining into which category a work falls.

Cardozo’s Barton Beebe led off the day’s second panel, which was devoted to the four fair use factors, by discussing his recent article presenting the results of an empirical study of fair use jurisprudence. Beebe analyzed all reported federal opinions through 2005 that made substantial use of the Section 107 four-factor test for fair use. He looked at which factors were most often considered in the decisions and concluded that the test is not as rigid as some critics have suggested. Beebe suggested that there is a need for more research into the actual use of fair use in the courts.

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Annual Spring IP Speaker Series Brings IP Leaders to Campus

The Spring IP Speaker Series got off to a wonderful start when Debevoise & Plimpton’s Jeffrey Cunard and Jon Palfrey, the Executive Director of Harvard’s Berkman Center, debated the issues of filtering and fair use. With the legal issues surrounding user-generated content headlining the news, the discussion proved both lively and timely. Cunard raised the concern that “user-generated” is a misnomer as the material uploaded onto the Internet is often merely a re-posting of various copyrighted works. He estimated that firms such as Viacom have lost over a billion dollars due to these unlicensed uses. Palfrey argued that much of the material posted falls under the fair use defense and should not be removed. When asked about filtering, he noted that because fair use is such a difficult legal concept, it would be almost impossible to filter without human review, a costly business model that is not foolproof. Cunard and Palfrey agreed that the recently proposed user-generated content principles, endorsed by content owners such as CBS, Disney and Viacom, might ameliorate some of the controversies. These principles provide for content owners to supply reference materials to user-generated content sites which could help identify infringing uploads.

The Visual Artists Rights Act was the subject of a lunch talk on January 29. Scott Lewis of Anderson & Kreiger LLP, who successfully defended Pembroke Real Estate in a suit brought by the artist of a sculpture garden the realtor had commissioned for one of its properties, and Richard Altman, who has represented many artists in their attempts to invoke their rights under the Act were the speakers.

Since its codification in 1990, VARA has led to a variety of litigation, including the dispute over the lobby de-
Family, friends, former students and colleagues remembered John M. Kernochan at a memorial service on January 11. A member of the Law School’s faculty for over forty years and a pioneer in legal education on copyright and authors’ rights in the United States, Professor Kernochan passed away on October 29, 2007.

In the often moving tribute held at the law school, testimonials were given about Kernochan’s scholarship and love of music and family. Daughter Sarah and son Denny began the morning’s program by offering a glimpse into Kernochan’s family life, highlighting his upbringing in New York and his love of words and languages. They were followed by University President Emeritus Professor Michael Sovern who was a student and later colleague of Professor Kernochan.

Adria G. Kaplan, former Executive Director of the Kernochan Center and longtime friend, called Kernochan an “enterprising man of vision” who developed the Law School’s clinical program in the arts as well as the summer arts internship program. A tireless advocate of authors’ rights, Kernochan was one of the founders of the American chapter of the authors’ rights group ALAI, and never stopped championing the rights of creators.

Kernochan’s best friend, in law school and throughout their careers, was fellow CLS professor Arthur Murphy. Murphy recalled how Kernochan refused a position on the Law Review because he knew it would mean more time away from his growing family. From their years on the faculty together, Murphy said he would always remember his friend’s skill as a politician, making sure that calm prevailed at sometimes contentious faculty meetings.

I. Fred Koenigsberg ’72 spoke of his mentor – the man who got him his first job – as someone whose devotion to students did not end at graduation. Carmen Abber, Kernochan’s former assistant, testified to his gentle way and kindness.

Kernochan was known for his love of music – he was a composer and ran a music publishing company while on the Columbia faculty – but he also had a rather bawdy sense of humor. Children John, Rose and Wayne told anecdotes about their father’s life, his poetry and song lyrics, many of which were based on ribald themes.

Music composed by Kernochan was played throughout the morning, including his best-known work “As I Ride By” which he wrote while serving in World War II.

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sign of a Long Island City building and a recent controversy over the fate of a wall sculpture on Houston Street in Soho. Altman represented the artists in both these cases.

Lewis discussed aspects of Phillips v. Pembroke Real Estate, Inc., in which a Massachusetts artist was commissioned by a realty group to design sculptures for a new park. When Pembroke Realty decided to redesign the space and move Phillips’ sculptures to another park that it operated in Rhode Island, Phillips sued under the Massachusetts Art Preservation Act and VARA. He claimed that the art was intrinsically tied to the area in which it sat and must remain on display in its current location. The court disagreed and said the art was not covered under either law. Lewis stressed the complications that would arise if such art were protected, contending that it would create an unrecorded, undetectable encumbrance on the land, potentially preventing the owners from selling or otherwise disposing of the land as they wished.

Altman expanded on the conflicts created by Congress’ attempts to comply with the Berne Convention and America’s jurisprudential history. He characterized VARA as a civil law principle trapped in a common law system. In his view, VARA cases often raise a conflict between moral rights – a concept not readily accepted in U.S. law – and common law notions of property (which, he noted, always seem to prevail.)

Viacom’s Stanley Pierre-Louis and Andrew Bridges of Winston & Strawn LLP debated the issues surrounding secondary liability on February 12. Bridges categorized the battle as one between copyright holders and consumers, with innovation caught in the crossfire. Pierre-Louis acknowledged that the technology of file-sharing has outpaced the development of protection measures, but said he didn’t believe it was fair for entrepreneurs to use copyrighted works as seed monies for businesses.

Adjunct Professor I. Fred Koenigsberg ’72 of White & Case LLP and Bruce Joseph of Wiley Rein LLP provided a master class in music licensing on March 4. Koenigsberg provided background on copyright in the music industry, breaking down an extremely complex topic into its fundamental basics before handing the podium over to Joseph, who addressed some of the challenges brought about by the industry’s transition to the digital realm. At times raising more questions than answers, Joseph looked at Section 115 of the Copyright Act, which governs compulsory licenses for the making and distributing of phonorecords. He discussed the issues that confront practitioners such as: Are interactive streams subject to the reproduction and distribution right? Do downloads qualify as public performances? Joseph suggested that most of these questions would be answered in the courts in the not-too-distant future.
Current Controversies Highlighted in Panel on Deaccessioning

On March 11, the Center hosted a discussion entitled “Breaking Up Is Hard To Do: Issues of Museum Deaccessioning.” Deaccessioning – when a museum sells off parts of its collection – has always been controversial. But as art market prices have spiked and sales have become more lucrative, the controversies have become more frequent and more heated.

From the New York Historical Society’s 1993 sale of decorative arts and paintings to the New York Public Library’s recent sale of the painting *Kindred Spirits*, museums have often faced challenges from donors and the public when they have attempted to raise money through the sale of pieces from their collection.

Professor Patty Gerstenblith of DePaul College of Law’s Center for Art, Museum and Cultural Heritage Law reviewed some basic principles of non-profit corporation and estate law, particularly the duty of care and duty of loyalty governing a non-profit’s board of directors. She offered the Barnes Foundation as an example of changing circumstances forcing a Board to challenge the indenture under which the collection was assembled. Ron Spencer of Carter Ledyard & Milburn LLP elaborated on the case of the Barnes Foundation, a non-profit that has seen itself in court 29 times over the past 50 years. Spencer highlighted some of the numerous, and often seemingly contradictory, specifications of deceased founder Albert C. Barnes’s granting instrument and concluded that sometimes, following a decades-old indenture is not practical.

A more recent controversy involves Nashville’s Fisk University and its desire to sell two paintings donated by Georgia O’Keeffe in order to shore up a diminishing endowment. O’Keeffe’s estate has sued the University, challenging its right to do so under the terms of the indenture. C. Michael Norton of Bone MacAlister Norton PLLC, representing Fisk in its litigation, has been working on the case for the past two years. He noted the significant number of cases in New York (the state law governing the Fisk case) of situations where donor or testator intent has been challenged. He expressed concerns that because indenture provisions never sunset, the restrictions may, in the end, hurt the works and the donee.

Lee Rosenbaum, creator of the widely-read CultureGril blog and frequent contributor to *The New York Times* and *The Wall Street Journal*, is a harsh critic of deaccessioning. She asserted that Fisk – which hoped to put the money raised through the sale towards its endowment – could raise money by other means, and suggested that the sale was the “easy way out” of a fiscal crisis. Acknowledging Norton’s concern that sometimes institutions lack the resources necessary to care for a collection, Rosenbaum suggested that museums loan objects they can no longer sustain, rather than sell them. She contended that it is a breach of the Association of American Museum’s guidelines to deaccession pieces except under limited circumstances. Norton countered that where realism and ethics collide, “realism needs to win.”

Young Alumni in IP and Media Law Panel, January 29, 2008

Panelists: Chris Hamilton, CLS ’04, an associate at Debevoise & Plimpton, Lasherelle Morgan, CLS ’01, currently serving as Associate Counsel at HBO, Wendy Szymanski, CLS ’03, an associate at Davis Wright Tremaine LLP, and Paul Gutman, CLS ’04, an associate at Carroll, Guido & Groffman LLP.
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tors of the test were most often relied on by the courts and how often the courts manipulated their four-factor analysis in order to achieve a desired outcome. His research revealed that the courts do not put as much emphasis on the transformativeness of the use as researchers and academics have believed.

Robert Kasunic, Principal Legal Adviser at the United States Copyright Office, and Boston College’s Joseph Liu approached the same problem – how to simplify the fair use analysis and make it more predictable – but offered two very different solutions. Kasunic argued that the oft-neglected second factor should be more prominent. He claimed that the courts categorized types of work too simply – published or unpublished, factual or fictional – and neglected the opportunity to make the test more substantial. By looking at the standards and practices of the industry into which the original work fell, courts could more accurately analyze whether or not the infringement was diminishing authors’ incentives to create, and whether or not the author was getting a fair return on her creative investment. Liu believed that by focusing only on the purpose and character of the alleged-infringing work and its market impact, that is by assessing the first and fourth factors, and disregarding the second and third, courts would reach more predictable decisions. Furthermore, he argued that courts should either disregard or de-emphasize on the amount of a work used as courts’ analyses of factor four usually subsumes considerations of the quantity copied.

The final panel of the day looked towards the future and examined new trends and challenges. Jessica Litman of the University of Michigan argued that whatever side of the issue one is on, fair use is not working in its current state. The four-factor test dates from an era when widespread personal uses were uncommon and distributors had to be compensated in order to give them an incentive to disseminate works. Litman’s analysis focused on the consumer, arguing from a policy perspective that there is no point in encouraging creation without encouraging use. Columbia’s Tim Wu elaborated on the idea of copyright holders encouraging end users. He explained his theory of Tolerated Use – the idea that rights holders are expanding their tolerance of end users by enforcing copyrights less frequently when they feel the use does not hurt them financially and noted a corresponding rise in “opt-in” systems of copyright. “This isn’t new,” Wu said, “It’s just in the past we have answered [the issue of widespread use] with a compulsory licensing regime.” Perhaps it is time, Wu continued, for rights holders to codify their no-action policies. The day ended with Chicago’s Randy Picker’s pronouncement that there was no “fair use right.” Looking at an economic analysis of the creative process, Picker concluded that an absence of copyright protection would lead to a race to exploit a work in every format imaginable at an early stage in order to avoid competition; such haste would only produce a waste of resources. Strong copyright protections, therefore, lead to a more efficient production and consumption.

The symposium was heavily attended and well-received. The papers will be published in an upcoming volume of THE JOURNAL OF LAW & THE ARTS.