



INSIDE THE INSTITUTE

Welcome to the *IILP News Flash FWD*:



I don't want to steal the thunder of Jillian Raines 2L, the editor, so I won't tell you what is in this inaugural edition, but I did want to congratulate her and all the writers for putting together a great collection of articles that I hope you find fun and informative. All of the material is written by students, and the *FWD*: is a testament to their abilities as writers and soon-to-be-lawyers.

When the idea of a newsletter was floated past me, I was initially a little suspicious. In an era of Twitter and blogs and RSS feeds, why would a center devoted to information law and technology adopt a communication medium as old-fashioned as a newsletter? But newsletters are wonderful ways of informing readers about topics in a coherent and focused way, a way that we somehow miss with the disaggregated content that swirls around the Internet. It provides a forum for students to write, it is the source of a particular IILP voice, and, at the end of the day, it generates the opportunity to build a community. And since this pretty much defines the purpose of the IILP, this newsletter is a great addition to the ways that we communicate our message.

We hope you enjoy reading the *IILP News Flash FWD*: and look forward to hearing any feedback from you.

Dan Hunter

LETTER FROM THE EDITOR

Welcome to the *IILP News Flash FWD*:. The *FWD*: is the product of a tremendous eagerness to find ways to use technology and the wealth of willing students to better communicate with all those interested in NYLS's Institute for Information Law & Policy. To current students, I assure you there is no cause for fear—our beautifully colorful flyers will still be posted throughout NYLS. This newsletter is just another way for you to keep apprised of what is happening at the IILP. And for those of you outside the walls of NYLS looking to stay in touch with the IILP, the *FWD*: will hopefully help with that, too.

So what exactly does it entail? For starters, the *FWD*: will give readers a chance to hear directly from the Institute's esteemed and incredibly interesting faculty members. After all, IILP professors are doing pretty remarkable things, and the *FWD*:s "Inside the Institute" section will help clue you in.

The *FWD*: is also about giving IILP students a chance to participate in the greater IP discussion. To enable this, the *FWD*: features a section titled "Explain It." Whether it is a piece focused on a recent IP case, an expansion on a topic discussed at the IILP's monthly Harlan/Associate meetings, or something fun happening in the various industries touched by IP issues—the "Explain It" section of the *FWD*: will help introduce or elaborate on something that the IILP thinks is newsworthy.

And if you are interested in hearing about what it's really like out there, make sure to read "Meet an Expert," which provides an inside take from a working IP law professional. The section features interviews conducted by current IILP students who have had the chance to engage with people who are making their careers in intellectual property.

Also, please take a peek at "For Your Intellectual Enjoyment," which will hopefully serve the purpose that its title suggests. Institute Director Professor Dan Hunter, Post-graduate Fellow Christopher Wong '08, and the student research fellows (collectively) will share with you content they are reading or watching and why they think it's noteworthy for *FWD*: readers to check out.

And of course, “This Month at the IILP” is self-explanatory; mark your calendars with all of the upcoming Institute events and learn about events you may have missed.

Another thing worthy of note: the *FWD*: is comprised of all student-written content with the exception of our faculty column. The IILP has an enormous wealth of resources when it comes to students excited to participate in the IP discussion, and the *FWD*: gives an opportunity for us all to benefit from tapping into that resource pool. So, without further ado, please enjoy our inaugural issue. And please do not hesitate to contact me if you have comments or ideas for things you would like to see in our future issues. Thanks for reading.

Jillian Raines

WHAT'S HAPPENING AT THE IILP?

A Recap of “The Contours of Strong Patent Policy in the 21st Century”

By Raphael Majma 3L

On March 25, 2011, the Institute for Information Law & Policy hosted [David Kappos](#), the Under Secretary of Commerce for Intellectual Property and Director of the [United States Patent and Trademark Office](#). Prior to being appointed as Under Secretary, Mr. Kappos worked as Vice President and Assistant General Counsel of Intellectual Property at [IBM](#) and was an early proponent of the Institute’s [Peer to Patent](#) project. During his visit to NYLS, he spoke with current students, alumni, practitioners, and assorted guests about two specific areas: the Peer to Patent project and overall patent reform.

During the conversation, Under Secretary Kappos touched on the success of the Peer to Patent program, noting that “having the ability to connect through Peer to Patent can be a way to get that breakthrough in the patent system.” It was also hinted at that the broader lessons learned from the prior and current Peer to Patent pilots would be implemented on a larger scale in upcoming attempts at legislative patent reform. Under Secretary Kappos stressed that the Peer to Patent program was pro-small business and independent inventor, stating that the intent behind the program was not to “take cheap shots at your patent,” but rather to create a mechanism that leads to stronger patent examination methods and improving patent quality.

On patent reform in general, Under Secretary Kappos stressed its importance in the overall legislative agenda and advocated for a generational shift. Fee restructuring was on the table, but the USPTO would use its best judgment in making certain to incentivize best practices. On first to file reform, he suggested that many major patent applicants are already thinking about it due to its prominence internationally, and said that it would not create a significant change in the USPTO’s backlog. To see his full presentation, check out the Webcast [here](#).

To learn more about NYLS’s Center for Patent Innovations (CPI), be sure to read the most recent edition of [Patent Quality Matters](#), CPI’s internationally focused newsletter. Additionally, please follow Peer to Patent on Twitter [@peertopatent](#).

Upcoming Events in April:

April 14:

What: Harlan/Associate Discussion (Open only to Harlan and Associates affiliated with IILP)

When: 12:30 p.m.–2:00 p.m.

Where: W120

Details: Professor Richard Chused will lead a discussion on “Shepard Fairey and the World of Appropriation Art and Copyright Fair Use.” The fame of Shepard Fairey’s 2008 “Hope” campaign poster of Barack Obama is symbolic of a much larger strain in the contemporary worlds of art, music, and culture. While “appropriation art” and “mashup” music sampling have become big in recent years, their roots go back to the invention of collage at the end of the nineteenth century. Famous artists like Duchamp, Lichtenstein, Oldenburg, Warhol, and Koons; well-known photographers such as Sherrie Levine and Richard Prince; and a bevy of voice imitators, music samplers, DJs, and digital sound manipulators have all contributed to this appropriation culture. Join Professor Chused as he takes a journey through the world of appropriation aesthetics and asks whether copyright law can successfully navigate its way through the shoals of modern culture. Please RSVP to [Naomi Allen](#) by April 11.

April 15–16:

What: Future Ed 3

When: Friday, 12:00 p.m.–6:00 p.m., Saturday, 9:00 a.m.—2:00 p.m.

Where: New York Law School

Details: Got an idea about the future of U.S. legal education? Think it's time to go clinical? Or global? Or virtual? Should law be combined with other fields of study at the graduate or undergraduate level? Driven by the Carnegie Foundation's highly critical 2007 report and the dramatic downturn in large firm associate hiring, law school deans and administrators are scrambling to predict the future and position themselves within a rapidly changing market. *Future Ed* is a yearlong contest of ideas for innovation in legal education, focusing on ways to improve quality while reducing cost. Co-sponsored by Harvard Law School and New York Law School, the project has brought together educators, lawyers, clients, regulators, and legal entrepreneurs to design and test potential innovations in the law school curriculum, teaching methods, and the use of technology. Thirty proposals were presented at Harvard Law School in October 2010 and the best will be refined and presented at New York Law School. Interested? Questions? Please e-mail futureed@nyls.edu.

April 21:

What: Legal and Business Trends in the Video Game Industry 2011

When: 6:00 p.m.–7:30 p.m.

Where: W201 - Events Center

Details: The IILP and those involved with the NYLS student video game law blog "[All Your Law Are Belong to Us](#)" are pleased to present a panel addressing the key legal and business issues facing the game industry in 2011. Topics will include the rise of social games in the marketplace, the evolution of ratings in a world of digital distribution, changing demographics in the game industry, and the future of "core" games in the changing marketplace.

Panelists include:

- Evie Goldstein, Senior Vice President and General Counsel of the Entertainment Software Ratings Board
- Seth Krauss, Executive Vice President and General Counsel for Take-Two Interactive
- Adam Sultan, General Counsel and Senior Vice President of Business and Legal Affairs at Majesco Entertainment

Moderated by:

Dr. S. Gregory Boyd, Attorney at Davis & Gilbert LLP and NYLS Adjunct Professor

Please RSVP to [Naomi Allen](#) by Monday, April 11. Q&A and cocktail networking reception to follow.

EXPLAIN IT

Why Can't We Be Friends?: *ASCAP v. Creative Commons*

By Nyasha Foy 2L

Copyrights are like gold in the recording industry. The fixation of notes, lyrics, and sound recordings form the backbone of the revenue source that sustains this industry. For industry stakeholders, ownership of a copyright represents both bargaining power and potential income. Accordingly, when a new system threatens to destroy this infrastructure, industry stakeholders seize the opportunity to strike back. Such was the case when one performing rights organization took on a copyright-advocacy nonprofit.

This is the story of *ASCAP v. Creative Commons*.

This past summer, the American Society of Composers, Authors, and Publishers (ASCAP) asked for support against Creative Commons (CC) in a [letter](#) addressed to some of its members:

At this moment, we are facing our biggest challenge ever. Many forces including Creative Commons, Public Knowledge, Electronic Frontier Foundation, and technology companies with deep pockets are mobilizing to promote "Copyleft" in order to undermine our "Copyright." They say they are advocates of consumer rights, but the truth is these groups simply do not want to pay for the use of our music. Their mission is to spread the word that our music should be free. . . . We fear that our opponents are influencing Congress against the interests of music creators. If their views are allowed to gain strength, music creators will find it harder and harder to make a living as traditional media shifts to online and wireless services. We all know what will happen next: the music will dry up, and the ultimate loser will be the music consumer.

CC [responded on its Web site](#), declaring that:

Creative Commons [provides] legal tools that creators can use to offer certain usage rights to the public, while reserving other rights. Without copyright, these tools don't work. Artists and record labels that want to make their music available to the public for certain uses, like noncommercial sharing or remixing, should consider using CC licenses. Artists and labels that want to reserve all of their copyright rights should absolutely not use CC licenses.

So why all of the commotion? In order to understand this story, one must understand the players and their positions. On one side is the American Society of Composers Authors and Publishers ([ASCAP](#)), a membership association of more than 400,000 U.S. composers, songwriters, lyricists, and music publishers. ASCAP collects and distributes royalties on behalf of its members through its licensing deals. Among ASCAP's licensees are those who want to publicly perform copyrighted music. For example, when you listen to music on the radio, when you hear the music theme introducing your favorite TV program, or when your restaurant meal is accompanied by ambient background music, ASCAP works to collect money for these "performances" of copyrighted music.

[Creative Commons](#) (CC) is a nonprofit corporation that provides free licenses that enable licensees to distribute, remix, tweak, and build upon a licensor's work. CC works to increase the amount of creativity (cultural, educational, and scientific content) in "the commons." CC offers six types of [licenses](#), which vary in the level of control or protectable rights that the copyright holder reserves. Many musicians, including acts like [Nine Inch Nails](#), [Beastie Boys](#), [Youssou N'Dour](#), [Tone](#), [Curt Smith](#), [David Byrne](#), [Radiohead](#), [Yunyu](#), [Kristin Hersh](#), and [Snoop Dogg](#), have used CC licenses to share their music with the public. Many of the artists who use CC licenses are also members of collecting societies like ASCAP.

Given the objectives of these two organizations, the dispute between the two is not surprising. But to truly understand the tension that exists, let's focus on where it comes from. At the heart of this whole matter is Article 1, Section 8, Clause 8 of the United States Constitution—otherwise known as the [Progress Clause](#). This section provides the foundation for the [Copyright Act](#) and states that: "[Congress has the Power] to promote the Progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The two phrases—the "promotion of arts and science" and the "security of exclusive rights to Authors"—are key to understanding the issue between ASCAP and CC.

CC upholds its end of the bargain by promoting the arts and sciences. Through its various licenses, CC offers copyright owners the opportunity to legally provide copyrighted material for specific uses by other creative artists. These creative artists, in turn, have the opportunity to create new derivative works from this copyrighted material. This system gives the rights holder the ability to choose which level of protection they wish to assign to their work. The system also offers a streamlined process for creative artists to obtain material that would have otherwise been off-limits without the appropriate permission from the copyright owner.

But the Progress Clause also exists to secure certain exclusive rights for authors. One of these exclusive rights is the right to publicly perform artistic works. From ASCAP's perspective, it works to collect royalties for such public performances on behalf of its member authors. The money collected by ASCAP is distributed directly to ASCAP members, after ASCAP deducts a portion of these funds for its operating costs ([currently 11.3 percent](#)). ASCAP's concern seems to stem from the fear that if artists give away their creative works through free CC licenses, then a possible source of revenue [will begin to dry up](#).

This was a short-lived battle, for nothing more was reported after the initial comment letters. However, the concerns implicated by both organizations are at the core of the issues currently affecting the music industry. As emerging companies and organizations like CC continue to create new business models that empower artists, the advocates of the tried and true older business models fear that they will be left out of the (money) loop. The technology era has made this classic David and Goliath tension between the old and the new all the more apparent. And while the lines have been drawn, the only way a resolution will come is if and when all parties can come to the table and work together. So the question currently at issue is: Can we all be friends?

MEET AN EXPERT

**An Interview with Karen Artz Ash '80**

By Jeffrey Lawhorn 2L

On January 7, 2011, I had the opportunity to speak with Karen Artz Ash, a 1980 New York Law School graduate and practicing IP lawyer. Ms. Ash is currently [a partner at Katten Muchin Rosenman LLP](#), and is the national chairperson of her firm's intellectual property practice. She is also teaching a course in fashion law at NYLS this semester. Below are edited excerpts from the interview.

Q: How would you describe what you spend your days doing at Katten as an IP lawyer?

A: Well, first and foremost I am chairperson of our national [IP] department, so some portion of my day is obviously spent doing managerial and administrative overseeing. And also, as part of my firm responsibilities, I am on our Executive Committee and spend my time, again, to some extent doing administrative, managerial, sort of day-to-day work, which includes overseeing the allocation of work among other partners and associates.

In terms of the substantive work that I do, probably my personal practice area is about 90 percent within the fashion industry, largely on the transactional and licensing side, though I do venture in and out of litigations as they arise. So, during the course of the day I will be spending a lot of time . . . with day-to-day [client] questions, and providing strategies and advice with respect to [a client's] performance under their various license agreements, with respect to negotiating and entering into new license agreements, or terminating old agreements. And this is global, so there are issues that arise during the course of the day that are not governed by either New York law, or U.S. law for that matter.

Other parts of my day are spent evaluating the ability of a client to use a particular graphic or trademark or to enforce it against another party, or to [help a client] navigate their way through another party's proprietary rights to ensure that they are not [infringing].

Q: When you were leaving law school did you expect you would be doing the type of work you are doing today?

A: Not really. [Laughs] When I was at New York Law School, the summer after my first year, I worked as a clerk in the federal bankruptcy court. It was something I chose not to do going forward, but I will tell you that it has served me well on a good part of the work I do in the context of licensing issues which relate to bankruptcy issues, which I understand better than most. My second summer I was a summer associate at Baker & McKenzie, where I focused essentially on a broad range of largely corporate-based work and largely international-based work.

Then, when I graduated, I joined Kaye Scholer as a general litigation associate, interestingly working directly with the former bankruptcy judge that I worked with after my first year. So there was a connection right there. And within several months I transitioned to the intellectual property department at Kaye Scholer, which was really a trademark department. That was my transition into the IP field.

And about three years into that, the firm, Kaye Scholer, made a determination that it wanted to integrate the intellectual property department into the antitrust department and focus more on litigation, as opposed to a broader range of work. The consequence of that was that all of the attorneys in the intellectual property department at that point sort of dispersed and decided to go to other firms, including the two governing partners . . . Ultimately, I left and went to an intellectual property boutique firm. At that point, in the mid to early 1980s, IP work was tending to trickle out of large firms and into the smaller specialty firms. So, that's what I did. I spent close to 18 years at a specialty firm . . .

Q: Were you doing fashion law work there?

A: Yes. That's really where I started to do that sort of work. At the time, and it's not dissimilar now, most IP boutique practices were more patent-dominated and engineer-dominated. The particular firm that I went to had a large fashion practice as well on the soft side, on the trademark and copyright side, which is what I was hired to do and what I ended up doing. And I built my relationships over time and my knowledge over time in that particular industry doing a lot of M&A work, a lot of transactional work, a lot of licensing—all of the things that were really just beginning to establish themselves as a means of doing business in the fashion industry.

And then in 2001, I was offered the opportunity to come to Katten's predecessor firm and to bring my IP practice . . . The fashion law practice area was nonexistent [at the firm at the time]. So I brought my clients, my practice area, and a number of associates and paralegals and built a new practice . . . and that is where I am.

Q: I'm wondering what you do to relax, to achieve some sort of a work/life balance?

A: Well, right now I dance. My husband and I do ballroom dancing. We largely focus on Latin dancing, so it is very high energy. And we do it three to four hours a week . . . at a dance studio on 72nd and Broadway. It's a Fred Astaire franchised studio, and has the absolutely most wonderful instructors. They are all professional dancers and they are interesting. And so that's an outlet for us.

The other thing I've always done from the day I walked out of law school is that I work out every day. I have worked out with a trainer for 25 years. Every single day without fail. I now do it in the morning before I come to the office.

Q: Do you have any bits of advice to offer to current New York Law School students?

A: I would say, obviously, working hard is significant and important, but I would say it's looking at a lot of opportunities and letting them take you where they do to some extent . . . I think students generally tend to be a little bit more focused and directed to a particular career now than perhaps when I went to law school, or even college. And while I think that is very good, and certainly as a hiring partner I look for someone who shows a commitment to a practice area, I would say don't be afraid to let the opportunities take you where they take you.

Q: What do you make of the Innovative Design Protection and Piracy Prevention Act, the fashion law bill that made it out of the Senate Judiciary Committee in December?

A: I don't think it's going to pass. I have been involved in and out with that bill on all sides. And I think, ultimately, the criteria that were set out in that bill makes the hurdle [for showing that one created an original and copyrightable design] so high that it would be pretty difficult for almost anyone to sustain a claim against a third party for allegedly copying. The origins of most designs, one way or another, are rarely uniquely original . . . Everybody, to some extent, will borrow from everybody else because that is what fashion is about at its core. So I think that one thing about that particular bill, should it proceed, and it's been in and out and around for a long time . . . is that it's probably going to make lots of work for lawyers. There are lots more questions, lots more discovery, and a lot more challenges that are likely to come out of it than an immediate quick fix.

Q: What do you think the biggest change has been between IP when you first became involved and what IP is now?

A: It's a much more developed area of law on the non-litigation side of things. IP has always had an evolution. Obviously, there's always been a thriving litigation aspect of it. That's really where I began. But I think that there is a tremendous evolution because of the nature of business. It used to be, not when I started to practice . . . but not all that long before, that the idea of licensing [a trademark] was just contrary to the premise of a trademark being an identifier of a single source. And the law has evolved; the statutes have evolved. The work has evolved in a way that now accommodates the fact that almost no company manufactures domestically, and so you've got to have a global reach and a global understanding, and you have to understand how to ensure quality control and make sure that a brand owner is standing behind their brand in the proper way. Also, today many of the large design houses . . . license their names across the board to a variety of licensees up and down the quality chain, and all over the world. That's something that's evolved fairly recently over maybe the last 40 years. Parties will enter into [trademark licenses] now and know what to do to make sure that they are maintained as valid. Whereas, maybe 40 or 50 years ago that just didn't happen. It was a rare business model.

At the end of our conversation, Ms. Ash mentioned that she is looking forward to teaching at NYLS this semester. I'm certain the Law School, as well as the student body, is happy to have her as well.

For the full interview, check out the IILP microblog.

04
2011

NEWS FLASH FWD!

FOR YOUR INTELLECTUAL ENJOYMENT

Professor Dan Hunter: Appropriation artists take work from others and turn it into something else. This movement has a venerable tradition, beginning with Marcel Duchamp's readymades and threading its way through Warhol, Rauschenberg, and others, and now finding its most notable figures in Jeff Koons, Shepard Fairey, and Richard Prince. Recently a SDNY court [concluded](#) that Richard Prince engaged in copyright infringement by using a large number of photographs of Patrick Cariou. Appropriation art is a really vexed area for copyright law and is absolutely fascinating. In the video, Shepard Fairey, the creator of the iconic Obama "Hope" poster that was the subject of a copyright infringement suit, talks about how he makes art and how it relates to copyright issues. The IILP will be looking to run a symposium on appropriation art after the summer, so if you're interested in this please get in touch. Check out video here: <http://www.gestalten.tv/motion/shepard-fairey>.

Chris Wong: To kick off 2011, the technology policy think tank TechFreedom released a new book titled *The Next Digital Decade: Essays on the Future of the Internet*, which explores the next chapter in the development of the Internet. It is a great collection of essays from some of the premier leaders in the digital futures space, including essays from New York Law School's very own Professors James Grimmelman and David Johnson. The book is available as a free download at http://nextdigitaldecade.com/ndd_book.pdf.

Student Research Fellows: Want to know what the Obama administration is proposing to Congress in the realm of enforcing intellectual property legislation? Check out the administration's white paper on piracy: [Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations](#), which discusses the administration's previous efforts and future proposals to curb economic harms due to piracy and counterfeits in the online arena.

CONTACT INFO

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To submit feedback, contact IILP Student Research Fellow [Jillian Raines](#).