



JENNIFER JENKINS



A passion for art and IP

Jennifer Jenkins '97 describes her first class in intellectual property, taught by Professor David Lange, as a transforming experience.

"He began the semester with a discussion of the Ansel Adams photograph 'Moonrise Over Hernandez,' and used it as a springboard for wrangling with some of the fascinating issues that underlie the concept of intellectual property. 'What are the creative elements in this photograph? What should it mean to protect a moonrise, once we decide that it has actually been created? What if someone went to the same site and tried to replicate the work, or, through serendipity, happened to take a similar photo? Is this legal?' At that moment I became intensely interested in intellectual property law. He set my career path in motion."

Jenkins, also a fiction writer and musician, went on to take as many of Lange's other classes as she could. Following graduation, while getting an MA in English at Duke, she collaborated with him on a video, "Nuestra Hernandez," which revisited the Adams photograph as the starting point for a fictional documentary dealing with appropriation. Lange, for his part, calls Jenkins "supremely creative."

When she began working as an associate with Kilpatrick Stockton in Atlanta, Jenkins' artistic background made her a natural to work on intellectual property cases involving musical and literary works. These included the pivotal copyright case surrounding publication of *The Wind Done Gone*, Alice Randall's 2002 novel that parodied the romanticized portrayal of slaveholding society in *Gone with the Wind*. Jenkins' firm was retained after the heirs of Margaret Mitchell had filed for a temporary restraining order and preliminary injunction against Randall's publisher, Houghton Mifflin, on the eve of publication. It was a complex and compelling case that, she says, touched a nerve for her because of the effective ban against publication of Randall's work, which raised issues at the core of the First Amendment's free speech protections.

"Randall had used elements from *Gone with the Wind* for parody, for satire, for social and political commentary and criticism. There was a strong intuitive sense that this kind



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of speech should be permissible. But the role of the prior restraint doctrine in copyright cases was unclear, and while the Supreme Court had articulated a copyright ‘parody’ defense, this defense had not yet been applied to a literary work such as ours. We were in uncharted territory, and there was a lot at stake.”

The case highlighted an ongoing debate as to whether there should be an independent First Amendment defense to copyright claims, or whether free speech concerns are adequately accommodated by copyright doctrines such as fair use. The District Court granted the injunction against the book’s publication, rejecting both fair use and First Amendment arguments. After an expedited appeal, the 11th Circuit vacated this injunction from the bench on the grounds that it was an unconstitutional prior restraint of speech. Then the Court’s full opinion, issued almost six months later, focused on fair use, finding *The Wind Done Gone* to be a parody of *Gone with the Wind*.

Another case that stood out for Jenkins involved the alleged appropriation of a simple synthesizer accompaniment in a hip-hop song. With a solid background in music theory—she plays multiple instruments—Jenkins found herself having to explain such things as the conventions of borrowing in different music genres, and the specific relevance of certain rhythmic variations to the hip-hop genre. “We were trying to mold music to legal doctrine without deforming either in the process.”

Jenkins says her experience in practice cemented her love of intellectual property and her appreciation of how the law must adjust to support creation in different art forms. “It became clear to me how critical it is for copyright law to draw the right line between what artists can and cannot use, both in terms of its impact on what – and how – artists are allowed to create, and on the type of creative works we as a culture can enjoy.”

An outgrowth of that passion is the

Arts Project of the Center for the Study of the Public Domain, which Jenkins established shortly after her return to Duke Law School as the CSPD’s director in 2002. Issues relating to music and the creation of documentary film have been a particular focus, and in early April, she was able to showcase them during a one-day conference called “Framed!: How Law Constructs and Constrains Culture.” Held in conjunction with Durham’s acclaimed Full-Frame Documentary Film Festival, it brought together filmmakers, musicians, and legal experts to discuss the interplay between art and intellectual property.

“One recurring theme was the tension between the artists’ need to protect and make a living from their works, and their need to use protected content in order to create in the first place. The question at the heart of the conference became: How can we strike the balance between providing economic incentives, and ensuring the availability of necessary raw materials, in a way that best nurtures creativity?”

During the conference, world-renowned documentarians recounted experiences with legal hurdles, such as trying to clear rights to images and music in their films. “Documentaries are records of our culture, and our culture is full of legally protected materials—songs, photographs, television shows, logos, signs,” Jenkins explains. “Filmmakers are necessarily going to capture some of this in their footage. But in order to distribute their documentaries through conventional channels, they must often clear the rights to almost all of this content, whether it’s the focal point of the scene, or merely an incidental or fleeting detail.”

In some cases, this means that documentary scenes are actually fictionalized—if a background song is too expensive to license, it will be replaced by one in the public domain. The conversation surrounding the song may in turn be manipulated as well. Particularly troubling are the impacts

of licensing practices on important historical documentaries. Films such as “Eyes on the Prize,” a record of the civil rights movement, are no longer sold or distributed outside of educational settings, due to the prohibitive costs of renewing licenses. “Imagine such a documentary without the music of the 50s and 60s, or the snippets of news and popular programs necessary to give a feel of the time,” says Jenkins. “But since such licenses expire relatively quickly, those records of our culture are literally disappearing from circulation.”

“Framed!” also explored how copyright law and musical composition intersect and often collide at the fine line between creative borrowing and theft. A live demonstration illustrated some of the finer issues of appropriation in music—how different traditions reinforce the practice of borrowing and recombining musical elements, the various motivations for doing so, such as homage or parody, as well as the distinction between “spontaneous” borrowing, as might occur in a live jazz performance, and that of a more premeditated kind. “In the music area, it’s one thing to read the law on the books, and another to see how it actually plays out,” observes Jenkins. “What happens in practice can depend as much on the customs in a given musical genre or the assumptions of a group of artists as it does on the words in the Copyright Act.”

As is fitting for someone immersed in art, IP, and issues relating to the public domain, Jenkins wants to share the CSPD’s work. Among other things, she is now focusing on expanding and packaging the insights from the Arts Project in DVD, print, and even cartoon formats, in order to make them informative, accessible, and entertaining for a wide audience. All online material will be available under Creative Commons licenses. “Through our efforts, we hope to build greater awareness and understanding of the crucial legal and policy issues that help to shape our culture.” ♪