

# Copyright for the Next Millennium

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# What is Copyright?

- Legal protection providing exclusive rights of an author for original work in a tangible medium for a limited period of years.
- Author has exclusive right to copy, distribute, create derivative works, sell, license or grant permission for others.
- With exceptions, such as “first sale,” “classroom use,” compulsory licensing and “fair use.”

# Brief History of Copyright

- In Anglo-American law established in the U.S. Constitution of 1789
  - “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”
  - Congress passed the first copyright law in 1790
    - \*Copying\* British law,
      - Limited scope and terms (14 +14), plus registration
  - Balance incentive with innovation in a free market political economy

# 19<sup>th</sup> Century United States

- Weak copyright protection by comparison to the U.K., and the worst infringing country in the world!
  - Developing country, not bound by treaties to abide by British copyright, it reproduced Austen, Dickens, and Thackeray with abandon!
  - Not unlike how we tend to think of developing countries today.
  - Incremental increase in terms; case law precedent for fair use.

# 20<sup>th</sup> Century United States

- Beginning with 1909 copyright law, piano rolls and Mark Twain testifying before Congress, the United States quickly began strengthening its copyright laws, in concert with its becoming an industrially developed country.
- The 1976 Copyright Law is our *current* law, shaped extensively by content owners who used existing technology, social norms, and market forces to reinforce broad scope, extensive terms and no registration requirement, while also codifying fair use.

# Terms of 1976 Copyright Law

- Scope
  - Original work in a tangible medium
- Terms
  - Life of the author + 50 years
  - Corporation: 75
- Registration
  - No longer required except for damages (statutorily set at \$750 – \$150,000)

# Copyright Extension Act of 1998

- Extended the terms of copyright protection by 20 years
  - Individual: life + 70 years
  - Corporation: 95 years
- Sobriquet “Mickey Mouse Protection Act” not an exaggeration: Bought through lobbying by the Disney Corporation, concerned that Mickey Mouse was about to enter the public domain.

# Digital Millennium Copyright Act of 1998

- Section 500 provisions
  - Establishes a procedure whereby a content owner can contact an Internet Service Provider of alleged infringement
    - Four “safe harbors” for ISP to establish immunity from liability
- Section 1200 provisions
  - Establishes new, substantive copyright law making the breaking of encryption on a DVD an infringement

# State of Fair Use: Copyright's Battleground

- 1976 established the four factor test:
  - Type of material, amount used, nature of use and commercial quality
- Case law continues to expand it
  - *2 Live Crew* “Pretty Woman” case and parody
- But ... under attack by publishers and other content owners via contract and litigation

# Fair Use: Three Cases on Point

- Google Books
  - Potential to define fair use for the Internet that could set the rules for the next century (new suit as of 9/12)
- Georgia State v. Association of American Publishers
  - “Indirect infringement” or fair use?
- Rap/Remix
  - Early threats of litigation has resulted in a practice among labels that automatically seeks permission and pays fees even for small snippets of songs
    - Janet Jackson “Escapade”

# Copyright in the Internet Age

- Copyright B.I. and A.I.
  - Before the Internet and After the Internet
- Whoever owns content controls the Internet.
- Most of the Internet or other information technology tools is privately owned, not open source, public domain or “public space.”

# Copyright Conundrums for the 21<sup>st</sup> Century

- Technology disrupted the twentieth-century business models for the prevailing content industry
  - Established largely in the United States, but by virtue of the Berne Treaty, extending over developed countries
    - With some exceptions, for example the “moral rights” provisions that obtain in the European Union

# Out of Balance

- Technology has thrown copyright law out of balance with social norms and an information economy.
  - Scope too large especially without registration
  - Terms too long so as to create a perpetual ownership by legislative installments;
  - Damages too extensive ... and orphan works ignored
- Content owners want law to compensate for how technology undermines its control.

# Generation of Criminals

- The law as cudgel to beat users is a losing battle because it is cross purposes with technology and a balance of incentive and innovation.
- Furthermore, it undermines citizenship – the core of a democratic society – by making criminals of us all for no greater purpose than financial remuneration.

# Challenges Within the United States Law and Society

- Balance copyright law in keeping not only with social norms, technology and the market, but with fundamental values of democratic societies.
  - Free speech
  - Innovation and incentive
  - Citizenship
    - Requires a vast and dynamic public domain

# International Challenges

- Harmonize copyright law between “developed” and “developing” nations
  - Asia, for example, now where the United States was in the 19<sup>th</sup> century
    - China is moving quickly towards some harmony because it wants to protect its own growing market in intellectual property
  - Possible to create some form of sliding scale rather than blanket acceptance of United States law?

# International Opportunities

- European union has exerted a stronger and more autonomous governmental role in Internet policy and law.
  - Antitrust is the most prominent example
    - Microsoft
    - Google
      - Privacy
      - Algorithm
- France and Britain have forged a three strikes law for copyright infringement
  - For whom?
  - Sufficient due process?
  - Governmental discretion and exerting more pressure on Internet Service Providers than in the United States today.

# As United States Hegemony Fades ...

- Might it be possible to talk together as a global community?
  - European “Moral Rights” as an important quality that preserves the transcendental aspects of copyright evident in U.S. Constitution.
- What are the first principles of copyright?
  - A balance of innovation and incentive
  - Free speech and a dynamic public domain
  - Citizenship in a participatory and semiotic democracy

# Conclusion

Copyright is a central international policy issue.

It involves freedom of expression, semiotic democracy and a discursive culture.

Fairness and ordered liberty, commoditization of individuals and the undue influence of multinational corporations are at the political core of its meaning not only for its future, but ours.

Per Favore,  
Le vostre domande?