Observations From The Trenches: Is The 1976 Act Irrelevant?

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Is Traditional Copyright Law Obsolete or Superfluous?

• Alternatives to Statutory Rights
• End Runs Around Statutory Exceptions
• The Copyright Act and Secondary Liability Rules
• Alternatives to Private Civil Enforcement
• Legislative Process End Runs
Alternatives to Statutory Rights

• Paracopyright
  – Audio Home Recording Act
  – Digital Millennium Copyright Act Anticircumvention Provisions

• Trademark
  – Protection of Attribution Right; Cf. Section 106A
  – Protection of Lapsed Copyright (Note Dastar Failure)
End Runs Around Statutory Limitations On Rights

- **Section 102(b) Scope Limitation End Run:** Hot News to Protect Ideas/News Headlines; Database Protection failure
- **Section 107 Fair Use End Run:** DMCA Anti-Circumvention Provisions: No Fair Use Exception
The Copyright Act and Secondary Liability Rules

• Silence on Secondary Liability (Unlike Patents)
• Betamax: General Vicarious Principles
• Divergence from Other General Principles (Compare Trademark, ECPA, Fair Housing Act)
• Negligence Supplanting Secondary Liability
  – Aimster: Burden to Show Cost of Avoidance
  – Perfect 10 v. Amazon.com: "Simple Measures" Required to Avoid Harms
  – Just Use Negligence Theories Entirely?
    • Injunctions Limited, Contributory Negligence
Alternatives to Private Civil Enforcement

- Broadcast Flag, Platform Control
- ISPs and Other Intermediaries (Universities, Banks?) As Police, Prosecutors, Judges, And Executioners
- White House Intellectual Property Enforcement Coordinator (???)
Legislative Process End Runs

- **Courts:** Grokster Drops Deference of Betamax
  - Hatch/Leahy Brief in Grokster: Ignore Our Failure to Pass INDUCE, So Just Impose It Judicially

- **Private Ordering of Public Policy**
  - Courts – Google Book Search
  - Prepackaged Legislation (e.g., AHRA)

- **Copyright Clause Yields to Commerce Clause**

- **Private Ordering of Public Policies and Facilities Outside Law** (e.g. Inter-Industry Agreements)

- **Policy Laundering Through Treaty, FTA Process**
  - Legislative Branch Yields to Executive