HOW CAN REFORM HAPPEN?

• Legislature obviously plays a significant role, but it is not the only actor
  – Some things only Congress can do
• Courts can do a number of things such as:
  – Refining infringement tests, scope of © issues, and remedies
  – Statutory damage rules particularly in need of guidelines so awards are more just
• Private ordering can contribute to reform
• But are there other modes or venues for reform?
© OFFICE

• It has done some good policy analyses
  – Orphan works study (2006) was well done
    • While I agree with Lessig that shorter terms of © would be better than long terms ameliorated by orphan works limits, this is better than 0
  – Sec. 115 report was thoughtful
  – Some anti-circumvention exceptions have been creative interpretations of its 1201 authority
  – Next Great Copyright Act initiative is stimulating

• Yet the Office has not fully recognized that © is now part of innovation policy, competition policy, cultural policy, educational policy, & changes to its contours have major economic implications
COP OFFICE REFORMS

• It should widen its in-house expertise
  – In-house economists & technologists?
• It should revamp registration & deposit processes
• It should probably take on some new functions
  – Do empirical studies before legislating or rulemaking
  – Commission studies on how well © is (or is not) doing its job
• Perhaps CO should have broader rulemaking powers
  – Inter-industry disputes: keep these details out of the statute; develop principles to guide decision-making
  – Adapting © to new situations (e.g., webcasting)
  – But if more rulemaking, CO will need greater authority from Congress; may need to spinout it out of LOC
• It is working on way to adjudicate “small claims”
  – P2p file sharing, fair uses, individual au v. publisher
OTHER MODES & VENUES

• Possible but unlikely
  – CONTU II? David Nimmer suggested this at a SW Law School program on © reform a few years ago
  – IP CZAR? Czar is supposed to focus on enforcement, not on its substantive provisions
  – Revive the Office of Technology Assessment? OTA-like body might suggest options and impacts, but not its job to rewrite the law

• More plausible venues & modes:
  – Scholarship and treatises
  – Projects by non-governmental entities
  – Social norms & practices
  – International initiatives
SCHOLARSHIP & TREATISES

• Scholarly articles rarely have any impact
  – But we can’t help but try and hope

• Treatises, though, are much more influential
  – © law is quite impenetrable; judges unsure what it means
  – Judges assume treatise authors have analyzed the cases, offer
guidance on compatibility of case law with legislative intent
  – Sometimes able to influence courts on novel issues, resolve
ambiguities
    • Their voices may be important in *Aereo*, for instance
  – Sometimes treatise authors even manage to contribute to
overturning clear expressions of Congressional intent
    • Nimmer’s interpretation of Baker v. Selden and sec. 102(b)
    • See 85 Texas L Rev. 1921 (2007)

• But who elected Nimmer and Goldstein? Should we be
leaving © reform entirely in their hands?
STUDIES & PRINCIPLES

• National Academy of Sciences might study
  – Did one on patent reform a few years ago
    • Many reforms proposed this report were
    • Digital Dilemma report from 1999, very recent report recommending evidence-based policymaking

• American Law Institute develops model laws and legal principles reports
  – Has managed to find consensus in other controversial areas
  – Has expressed interest in © reform
  – Gives careful and sustained attention by judges, practicing lawyers, & academics
  – High standards for quality; good review process
ALI PRINCIPLES PROJECT?

• Start with articulating 12-15 © principles
  – What are the normative purposes of ©?
  – What are the core components of a good © law?
  – State these norms and components in plain language
  – Provide comments and examples to illustrate them and how to work out tensions between promoting access & incentives

• Work toward model law if consensus on principles

• In near term, principles might “sit” on top of existing statute, making it more coherent, but over time, principles might evolve into new law
SOCIAL NORMS & PRACTICES

• P2P file-sharing of music & movies has had a toxic impact on public policy discourse on © reform
• There is unquestionably less respect for © among the public than is desirable
• But requiring © K-12 education is unlikely to change this
• DRM is not going to solve the social norm problem
• Web 2.0, user-generated content, fan fiction are evolving social norms and practices re © in a positive way
• Content industry’s better strategy should be to offer the public good content at reasonable prices, on reasonable terms, to experiment, & to be calm (do yoga?)
  – Darwinian lesson: It is not the strongest, smartest, richest, or those with the best lobbyists who will survive, but the ones who best adapt to the situations in which they find themselves
FREE CULTURE MOVEMENT

• Are they the vanguard of © reform in the US?
• They don’t ask lawyers whether they can remix culture; they just do it!
• By remixing culture, they participate in the evolution of culture and share it with others
• No longer passive consumers of prepackaged products of mass media industries, they have taken an active role in creative play, celebrated in many works:
  – David Lange “At Play in the Fields of the Word”
  – Edward Lee “Warming Up to User-Generated Content”
  – Larry Lessig, Remix
  – Tim Wu, Tolerated Uses
• There are more of them than there are of us; we may be the past, & they may be the future
INT’L DEVELOPMENTS

• WIPO © Treaty did a pretty good job of articulating some good © principles (in contrast to ACTA & TPP)
• WIPO development agenda and A2K movement are © reform projects
  – Marrakesh Treaty was a significant development
• Hugenholtz & Okediji on international instrument on © exceptions & limitations
• Hargreaves Digital Economy Report calls for new excep
• EU Wittem project aiming at harmonized European ©
• EC Consultation paper asks many ?s about © rules
  – Including whether there is a need for something like fair use
CONCLUSION

• When we talk about “© reform,” focus is generally on legislative initiatives
  – Given the recent hearings, there may be some bills in coming years
• But a NGCA is not likely any time soon
• Yet, there is more than one forum in which © reform can occur; let many flowers bloom
  – Recent burst of scholarship about this
  – ALI principles project probably the best bet for meaningful reform
• Many of us in this room and elsewhere are working on ideas about what a good © law would look like
• Because we can imagine it, reform is possible