

# MODES & VENUES OF © REFORM

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# 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 exceptions
- 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