VENUES FOR COPYRIGHT REFORM

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LOOKING BACK

• Good © principles embedded in Stat Anne:
  – Promoting learning is a good purpose for ©
  – Simple statement of eligible subject matter
  – Grant of rights to authors, allowing transfers to others
  – Limited scope, limited time(s)
  – Registry system to record who owns what, responsibility to make this registry available to all
  – Deposit copies with libraries
  – Consumer protection
  – Injunctions [but ick to per-sheet-penalty]
LOOKING @ U.S. CONSTITUTION

• Art. I, sec. 8, cl. 8 gives it power to promote the progress of science by granting exclusive rights to authors in their writings for limited times

• Long history of considering the grant to authors as a secondary consideration, the primary one being to promote public access to knowledge

• Utilitarian justification should be taken seriously
  – As Chris Sprigman pointed out yesterday, we don’t have very good tools to do this; how can we build better tools to achieve this purpose?
LOOKING NOW

- Normative purposes that © should serve are difficult to discern from the complex document that the 1976 Act, as amended, has become
- 1976 Act grounded in 1950s-era studies
- Profound technological, cultural changes since then
- Complexity of © was not such a problem when it only involved inter-industry relations, as Litman – But now implicates daily lives of many people
- Need for some reforms, but how to achieve?
• 3 ½ years ago, I decided to organize an effort to engage 20 or so copyright professionals for a 3 year effort to consider what was right & not so right about © & what might be done about it
• At first meeting, we chose to call ourselves the Copyright Principles Project
• At a minimum, we hoped to distill some principles for © on which reform could be built
  – 1st section of forthcoming report, now available
• If © law is to command respect from the population, then it needs to be a law that people can both understand & regard as fair
CPP PRINCIPLE 1

1. Copyright law should encourage and support the creation, dissemination, and enjoyment of works of authorship in order to promote the growth and exchange of knowledge and culture.

• 1.1. A successful copyright “ecosystem” should nurture a diverse range of works. It should encourage creators to make and disseminate new works of authorship and support readers, listeners, viewers and other users in experiencing those works.

• 1.2. To accomplish these goals most effectively, copyright law should embody rules that are clear and sensible, yet flexible enough to apply in a changing environment.
CPP PRINCIPLE 2

2. Copyright law should promote the creation and dissemination of new works in three distinct and complementary ways:

• by encouraging the provision of capital and organization needed for the creation and dissemination of creative works;
• by promising creators opportunities to convey their works to their intended audiences; and
• by limiting control over uses of creative works, as appropriate, to aid education, cultural participation, the creation of new works, and the development of new forms of creative output.
VENUES FOR © REFORM?

- **Congress?** Orphan works legislation is possible, but prospects dim for larger effort at this time
- **CONTU II?** Unlikely to happen, not likely to do better than CONTU I (which was backward looking)
- **Revive the OTA?** This could help a lot to offer suggestions about options and impacts, but not their job to rewrite the law
- **Courts?** Several things are possible here
- **Copyright Office?** Some things possible here
- **Scholarship, treatises?** Where some of the action is
- **Private ordering?** Lots going on in this domain
- **Social norms & practices?** Lots going on here too
© REFORM IN COURTS

• Several troublesome parts of © are susceptible to reform through courts
  – Refining tests for infringement
  – Fleshing out what is unprotectable under sec. 102(b) & why
  – Clarifying fair use & de minimis doctrines
  – Rethinking burdens of proof (e.g., automatic presumption of irreparable harm to © owner is difficult to justify post-eBay)
  – Refining certain remedies
    • Guidelines for statutory damages
    • When to order damages instead of injunctions
• Several recommendations in CPP report on this
© OFFICE

• It has done some good policymaking
  – Orphan works study was well done
  – Sec. 115 report was thoughtful
  – Some of the last anti-circumvention exceptions were creative interpretations of its 1201 authority

• Time perhaps to re-think its role because © is now part of innovation policy, competition policy, cultural policy, educational policy, & changes to its contours have major economic implications
  – But NOT to meld it into the PTO!!!
COP OFFICE REFORMS?

• Revamping registration & deposit process?
• Take on new functions?
  – Do empirical studies before legislating or rulemaking?
  – Commission studies on how well © is (or is not) doing its job?
• Widen in-house expertise?
  – Economists, technologists in-house?
• New power in CO to do rulemaking to deal with?
  – 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
• Adjudication of “small claims”?
  – P2p file sharing, fair uses, individual au v. publisher
SCHOLARSHIP & TREATISES

• Scholarship rarely has any impact
  – But we can’t help but hope

• Treatises have more impact
  – © law quite impenetrable; judges unsure what it means
  – Judges assume treatise authors offer best interpretation of the case law
  – Sometimes able to influence courts on novel issues, resolve ambiguities
  – Sometimes they even manage to cause overturning of 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 or Goldstein? Should we be leaving © reform entirely in their hands?
MANY PRIVATE INITIATIVES

- Various “openness” initiatives:
  - Creative Commons, Science Commons
  - Internet Archive, Open Content Alliance
  - Open source initiatives
  - wikipedia, etc.
  - MIT Open Courseware as a model for other universities
- “Best practices” guidelines for documentary filmmakers, makers of mashups and remixes
- Digital rights management technology initiatives (e.g., DVD-CCA)
- Google Book Search settlement as © reform
  - Probably the most significant development in © of our era
CPP REPORT

• Discusses 25 reform proposals
  – Some attracted support from all of us
  – Some reflect group consensus, but with varying degrees of reservations by some
  – Sometimes agreed on some things but not on how to fix
    • Termination of transfer rules are too complicated
    • How to fix? 1 idea discussed
  – Worth articulating pros and cons, benefits & risks

• We hope the report will generate further conversations about reform, not just criticism
SOCIAL NORMS & PRACTICES

- P2P file-sharing of music & movies has had a toxic impact on © reform
- There is less respect for © among the public than is desirable
- But requiring © 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 ©
- Better strategy is to offer the public good content at reasonable prices, on reasonable terms, to experiment, & to be calm (do yoga?)
  - Darwinian lesson: not the strongest, smartest, richest, or those with the best lobbyists who will survive, but the ones who are best adapted to the situations in which they find themselves
CONCLUSION

• Talk about “© reform” often focuses on legislative initiatives
• That kind of © reform not likely any time soon
• But there is more than one forum in which © reform can occur; let many flowers bloom
  – Recent burst of scholarship about this
  – CPP Report takes a broad look at problem areas, what some options for reform might be
  – 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